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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

RESPONSE NOT PRINTED (3 copies)

No. ...~~1436~~ 153

DANIEL McMANN, Warden of Clinton Prison, Dannemora, New York and HAROLD W. FOLLETTE, Warden of Green Haven Prison, Stormville, New York,

Petitioners,

against

WILBERT ROSS, WILLIE RICHARDSON, FOSTER DASH and McKINLEY WILLIAMS,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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STATUTES

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Petitioners, the Wardens of the two New York State prisons in which respondents are presently incarcerated,* pray that a writ of certiorari issue to review the judgments of the United States Court of Appeals for the Second Circuit in the cases of *United States of America ex rel. Wilbert Ross* v. *McMann* (judgment entered February 26, 1969); *United States of America ex rel. Willie Richardson* v. *McMann* (judgment entered February 26, 1969); *United States of America ex rel. Foster Dash* v. *Follette* (judgment entered February 26, 1969); and *United States of America ex rel. McKinley Williams* v. *Follette* (judg-

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* Respondents Ross and Richardson are in the custody of petitioner McMann; respondents Dash and Williams are in the custody of petitioner Follette.

ment entered March 20, 1969). The mandates have been stayed by the Court of Appeals pending the filing of this application for certiorari.

Citations to Opinions Below

Neither the District Court nor the Circuit Court opinions in any of these cases have as yet been reported. The District Court opinions are reproduced as Appendix "A" to this petition. The Circuit Court opinions are reproduced as Appendix "B" to this petition.

Jurisdiction

The judgments of the United States Court of Appeals in the *Ross, Dash* and *Richardson* cases were entered on February 26, 1969. The judgment in the *Williams* case was entered on March 20, 1969.

The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

Questions Presented

1. Does a claim that an otherwise voluntary plea of guilty was induced by the existence of illegally obtained evidence state a claim warranting relief by way of federal habeas corpus?

2. Should the new rule announced below be given retroactive application?

3. Do any of the instant petitions raise issues warranting evidentiary hearings?

Statement of the Case

In the instant cases,* the Second Circuit has held that the allegation by a state prisoner in a petition for federal habeas corpus that his guilty plea was induced by the "existence and threatened" use of evidence subsequently claimed to have been illegally obtained, entitles him to an evidentiary hearing to challenge the evidence as well as the claimed inducement.

In opinions inconsistent with reason and sound policy, and inconsistent, too, with the decisions of this Court and its own prior decisions, the Court has opened for collateral consideration and invalidation, virtually all pleas of guilty in New York, which comprise 95% of its judgments of conviction.

Having mandated hearings, the Court provided no "intelligible guidelines" for their conduct, as the powerful dissent of Judge Friendly pointed out. The instant petitions present unexceptional, belated allegations of coercion and inducement unsupported by the record or any outside facts. The decisions to require evidentiary hearings in such cases will preclude a contrary result in few others. The decisions are, therefore, possibly the most important cases in the criminal law field recently decided by a Circuit Court.

A. Ross:

Wilbert Ross was convicted in the former County Court of Kings of the crime of murder in the second degree upon his plea of guilty in satisfaction of an indictment charging

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* In a fifth case, *United States ex rel. Rosen* v. *Follette*, the Court of Appeals denied relief. An application for certiorari has been filed and is presently pending in this Court (No. 1762 Misc. Oct. T. 1968). Petitioners here have joined in that application.

him with the commission of murder in the first degree. On March 14, 1955 Ross was sentenced to a term of forty-five years to life. No appeal was taken from the judgment of conviction.

Ten years later he applied for a writ of error coram nobis in the New York Supreme Court, Kings County seeking to vacate the judgment of conviction rendered against him. The grounds for the application do not appear in the record. This application was denied without a hearing by order dated May 25, 1965. The Appellate Division unanimously affirmed the order without opinion, in *People* v. *Ross,* 272 N.Y.S. 2d 969 (2d Dept., 1966) (not officially reported) and leave to appeal was denied by the New York Court of Appeals on January 10, 1967.

In his application for habeas corpus to the United States District Court for the Eastern District of New York, Ross alleged that while in state custody he was taken to the District Attorney's office and questioned about the commission of a murder; that he was thereafter coerced into signing a confession; that his request for counsel was denied; and that he was not advised of his right to counsel or right to remain silent. Ross further alleged that five weeks subsequent to his being charged in an indictment with the commission of first degree murder, he requested his attorney to seek the return of his confession but that his court appointed attorney advised him that "it was out of the question". Further, Ross alleged that his attorney told him that in addition to the confession the District Attorney was in possession of the murder weapon and that a fellow participant in the crime would be a state's witness against him.

Some time thereafter, according to Ross, his counsel advised him that the District Attorney would accept a plea to murder in the second degree and that Ross would re-

ceive a sentence of from twenty years to life. Ross alleged that he then went into the courtroom and pleaded guilty to second degree murder and, as noted above, was sentenced to forty-five years to life imprisonment. He offered no evidence to corroborate any of his allegations.

District Judge Bruchhausen denied the application without a hearing on the basis of the opinion in *United States ex rel. Glenn* v. *McMann,* 349 F. 2d 1018 (2d Cir. 1965) which holds that "a voluntary guilty plea entered on advice on counsel is a waiver of all non-jurisdictional defects in any prior stages of the proceedings against him (*id.* at 1019).

B. Richardson:

Willie Richardson was convicted of the crime of murder in the second degree upon a plea of guilty which satisfied an indictment charging him with two counts of murder in the first degree. On October 9, 1963, he was sentenced in the Supreme Court, New York County to a term of 30 years to life in State Prison. No appeal was taken from the judgment of conviction.

In June, 1964, Richardson applied for a writ of error *coram nobis* to the Supreme Court, New York County alleging that he had made an involuntary confession and that his conviction "was based solely on this confession." No factual allegations were made in support of this claim except that he was arrested on a Sunday night and held until the following morning for arraignment. The application was denied without a hearing on July 27, 1964. On appeal to the Appellate Division, First Department, the order was unanimously affirmed (23 A. D. 2d 969 [1st Dept. 1965]) and on June 8, 1965 leave to appeal to the Court of Appeals was denied.

In his application for habeas corpus to the United States District Court for the Northern District of New York,

Richardson alleged that he was taken into custody in connection with the homicides of two relatives; that he asked to call an attorney since he was on parole and his request was denied; and that he thereafter signed a confession "obtained from his by means of abuse and threat of bodily harm". He claimed that his federally protected rights were violated in that he involuntarily pleaded guilty because of the existence of this confession. He vaguely mentioned that he was denied the right to withdraw his guilty plea—although it is not clear by whom—and he also obliquely challenged the quality of his lawyer's representation. Neither point was pursued as a separate claim.

After examining the petition and the minutes of plea and sentence, Judge BRENNAN determined that Richardson was represented by assigned counsel whose representation was not alleged to be ineffective, that the plea was accepted only after Richardson "indicated that such a course of action was desired by him and that he had discussed same with both counsel", that sufficient inquiry was made into the voluntariness of the plea and that Richardson pleaded to a lesser charge. He therefore concluded that the plea was voluntary and that no hearing was necessary. He characterized the claim as an afterthought, pointing out that "Almost 3 months [after the plea], when sentence was imposed, although opportunity was afforded [he] raised no question as to the validity of his plea".

Richardson moved for re-argument alleging that the minutes of his plea would show that after the plea was accepted he attempted to withdraw it, and told the Judge that he had confessed and pleaded to a crime he did not commit. Judge BRENNAN rejected this claim after finding that it had never been presented to the State Courts and that, in any event, insufficient facts were alleged in the petition. He specifically cited the lack of any reference to such a motion in the minutes of plea and sentence and the absence of any supporting affidavit from Richardson's attorney.

In his application to the Circuit Court of Appeals for a certificate of probable cause Richardson alleged for the first time that his lawyer advised him that his plea would not preclude a later challenge to the voluntariness of the confession since a guilty plea would not constitute a waiver of his constitutional rights. And in a new affidavit attached to his brief in the Circuit Court he alleged for the first time that his assigned attorney paid him only one 10 minute visit prior to the date of plea and that the decision to plead was made during a 3 or 4 minute conference on the day of plea.

C. Dash:

On February 9, 1959, one Schedletsky, was held up and robbed by three persons, at least one of whom was armed. On February 24, 1959, an indictment was returned in Bronx County in which one Fields, was named as a defendant and conspirator. The three robbers were indicted under the designations of "John Doe", "Richard Roe" and "Peter Loe" and warrants were issued for their arrest. Fields was apprehended immediately after the crime and, apparently, he implicated Dash and two others, Waterman and Devine. See *People* v. *Waterman*, 12 A. D. 2d 84 (1st Dept., 1960).

Dash was arrested on February 26, 1959.

Waterman was questioned by a detective on June 17, 1959, in the Tombs in Manhattan, where he was incarcerated on another charge, and again, on June 29, 1959, in the detention cells of the Bronx County building. On each occasion, according to the testimony of the detective, Waterman made a complete confession, admitting that he, Devine, Fields and Dash had participated in the robbery in question. See *People* v. *Waterman*, 9 N. Y. 2d 561 (1961).

According to Dash, following his arrest, he was questioned by the police and an Assistant District Attorney of Bronx County, which led to his signing a confession.

On April 6, 1959, Dash pleaded guilty to the crime of robbery in the second degree. Fields, likewise, pleaded guilty.

On August 3, 1959, Dash was sentenced to a term of 8 to 12 years as a multiple offender. Fields was sentenced to 10 to 12 years.

Waterman and Devine went to trial, were convicted of robbery in the first degree, grand larceny in the second degree and assault in the second degree, and were sentenced on December 1, 1959 to terms of 15 to 20 years.

They appealed that conviction and the judgment was reversed by the Appellate Division, First Department (12 A. D. 2d 84). On May 18, 1961, the New York Court of Appeals affirmed the order of the Appellate Division on the ground that it was constitutional error to admit into evidence post-indictment statements taken in the absence of counsel (9 N. Y. 2d 561). Thereafter, Waterman and Devine pleaded guilty to the crime of assault in the second degree and were sentenced to terms of 2½ to 3 years.

It was only then that Dash instituted two *coram nobis* proceedings in which he raised two points—(1) that he was entitled to the same relief as Waterman since his alleged confession induced his plea of guilty and (2) his plea was coerced by a threat of the Court to impose maximum punishment if he went to trial and was convicted and by his attorney's advice that he would undoubtedly be convicted in the face of the confession. The writs were denied without a hearing, the orders affirmed by the Appellate Division, First Department (21 A. D. 2d 978), and by the New York Court of Appeals, two judges dissenting (16 N. Y. 2d 493 [1965]).

Dash then petitioned the United States District Court for the Southern District of New York for a federal writ of habeas corpus alleging two grounds for relief. First, he alleged that a false confession was obtained from him by force and threats after indictment, in the absence of counsel, and second, that the plea was involuntary, being induced by the unrecorded threats of the trial court. The District Court (CANNELLA, J.) denied the application on the authority of *United States ex rel. Glenn* v. *McMann, supra,* and found, after reviewing the State Court records that Dash was not entitled to a hearing on the alleged coercion by the trial court.

D. Williams

On January 23, 1956 at about 9:30 p.m. in Bronx County, one Mable Cummings was held up with a toy pistol, raped and robbed. McKinley Williams was indicted for five felonies on account of this occurrence. After discussing the plea with his lawyer, he pleaded guilty in the County Court, Bronx County, on March 16, 1956 to robbery in the second degree. He was sentenced on April 19, 1956 to a term of 7½ to 15 years.

More than eight years later, on August 28, 1964, Williams applied to the Supreme Court, Bronx County, for a writ of error *coram nobis* to vacate the conviction upon allegations that: (1) prior to his plea of guilty a confession was coerced from him by the police and (2) counsel representing him upon his plea was inadequate because he "knew" Williams was out of the state when the crime was committed and because he advised Williams that the crime to which he was pleading guilty was a misdemeanor. The application was denied by decision dated September 14, 1964.

The denial of *coram nobis* was affirmed without opinion by the Appellate Division, First Department (*People* v. *Williams,* 25 A. D. 2d 620) and leave to appeal to the Court of Appeals was denied.

Williams then applied for a writ of habeas corpus to the United States District Court for the Southern District of New York. He alleged that his guilty plea did not constitute a waiver of his right to challenge his allegedly coerced confession because at the time New York did not provide a constitutional procedure for testing the voluntariness of the confession. He also claimed that although his attorney knew he was not in the state when the crime was committed he recommended a guilty plea because the plea was to a misdemeanor. District Judge Croake held that the first claim was barred by *United States ex rel. Glenn* v. *McMann, supra,* and rejected the second claim after reviewing the minutes of plea, Williams' prior record and on the authority of *United States ex rel. Martin* v. *Fay,* 352 F. 2d 418 (2d Cir. 1965).

Opinions Below

The Court of Appeals viewed these cases as raising "the narrow question" of whether a District Court should apply the standards of *Townsend* v. *Sain,* 372 U. S. 293 (1963) in determining whether to hold an evidentiary hearing on the claim that a plea was not voluntary "because it was induced by the existence, or threatened use, of an allegedly coerced confession." While stating that the mere existence of a coerced confession was not enough to invalidate a later plea by a defendant represented by counsel, the Court paradoxically decided that an investigation as to whether or not the plea was voluntary must take account of such a claim. Moreover, a hearing was required in the federal courts where there had not been a "full and fair" hearing in the state courts on the issue.

The Court concluded that this holding was consistent with its decision in *United States ex rel. Glenn* v. *McMann,* 349 F. 2d 1018 (2d Cir. 1965), *cert. denied* 383 U. S. 915

that a voluntary plea of guilty is a waiver of all non-jurisdictional defects. It asserted that that rule does not mean that an unconstitutionally coerced confession is never relevant to the issue of the voluntariness of the plea. The Court said that none of its previous decisions held that the waiver rule should operate to make an invasion of the defendant's constitutional rights irrelevant to the issue of the voluntariness of the guilty plea. The Court did not state how or why the claim was relevant to that issue either generally or in the specific context of the cases before it. Indeed, wrestle as it did with the factual allegations in each petition, the Court was unable to find a causal connection between the alleged illegality and the guilty pleas.

After reviewing its prior decisions, the Court set forth the following rule:

> "The rule should be stated: Where a petition for habeas corpus raises a claim that a guilty plea was not voluntary, the standards of *Townsend* v. *Sain* are applicable in determining whether to hold a hearing; and although the waiver rule means that an allegation that the petitioner's constitutional rights were violated before the plea was taken is not, standing alone, sufficient to call the validity of the plea into question, nonetheless if it is alleged that the plea was coerced in a manner spelled out in the petition, the alleged violations are not irrelevant to the issue of the voluntariness of the plea. An alleged violation of the constitutional rights is simply another factor to be taken into account in determining the voluntariness of the plea.
>
> On the other hand, the fact that the petitioner was represented by counsel and acted after consultation

> with counsel is also to be given substantial weight in determining the issue of voluntariness of plea."

The Court thus acknowledged that the role of the attorney in advising a plea was critical and speculated that even where there was evidence that a confession had been coerced, counsel might be justified in advising a defendant to plead "once a fair hearing by the state court had been held on a motion to suppress the confession and suppression has been denied." Although the opinion indicates that in other cases additional supporting materials such as the affidavit of the attorney who represented the petitioner or other exhibits or affidavits should be appended to the petition, the Court was satisfied from the petitions alone that the hearings were required.

The Court then cited that part of its decision in *United States ex rel. Rogers* v. *Warden,* 381 F. 2d 209 (2d Cir. 1967), which states that:

> "there is nothing inherent in the nature of a plea of guilty which, *ipso facto,* renders it a waiver of defendant's constitutional claims. Rather, waiver is presumed because ordinarily, such a plea is an indication by the defendant that he has deliberately failed or refused to raise his claims by available state procedures."

Relying on this language, the majority found that the only available state procedure by which these habeas corpus petitioners could have tested their confessions was the one declared retroactively unconstitutional in *Jackson* v. *Denno,* 378 U. S. 368. In the absence of a constitutionally acceptable procedure, the petitioners could not be deemed to have waived their coerced confession claims. Nor could they be deemed to have entered voluntary pleas of guilty

if the pleas were substantially motivated by coerced confessions, the validity of which they were unable, for all practical purposes, to contest. Only if it was found after a hearing either that the confession was voluntary or that the plea was not substantially motivated by the confession, could the conviction stand.

In the *Dash* case, the Court added that:

> "If it is found that there was no such threat by the the judge, and if the plea was freely made on advice of counsel because of the weight of the state's case aside from the confession, with apparent likelihood of conviction regardless of the confession, in a considered effort to obtain a lighter sentence, the Court may find the plea voluntary, and the conviction unassailable."

The Court viewed its holding as "apparently consistent" with at least the Third, Fifth, Sixth, Seventh, and Ninth Circuits.

In *Richardson*, the Court applied the rule of *Dash* and *Ross* after summarizing the allegations of the petition and setting forth the colloquy at the time the plea was entered. An evidentiary hearing was ordered on the ground that the colloquy was not necessarily conclusive on the question of whether the plea was voluntary and because of Richardson's claim that the plea was the result of the threatened use of a coerced confession which he had wanted to challenge but which his attorney had told him could be raised at another time.

In *United States ex rel. McKinley Williams*, the Court concluded that the *Ross* and *Dash* cases required that an evidentiary hearing be held where the petitioner alleged that the confession was the only evidence against him and that he had an alibi which his lawyer had refused to present to the Court. In *Williams*, there was also a claim that the petitioner did not know all the consequences of his plea.

In the *Ross* and *Dash* cases, there was a concurring opinion by Judge Kaufman relying on the decision of this Court in *Pennsylvania ex rel. Herman* v. *Claudy*, 350 U. S. 116. In support of the result reached by the majority, Judge Kaufman stated that when:

> "a petitioner alleges facts sufficient to support his claim that his guilty plea was substantially induced by the existence of a confession illegally obtained from him which he had no adequate means of challenging, and his allegations are not controverted by the record, we cannot avoid our duty—time consuming as it may be—to grant him a hearing. Of course, we are not suggesting for a moment that the writ should be sustained after such hearing. The petitioner must carry the burden of establishing that the coerced confession substantially motivated him in pleading guilty."

Chief Judge Lumbard, in a dissenting opinion, stated his conclusion that the guilty pleas of Ross and Dash were "entered knowingly and without coercion".

> "It is altogether clear that the defendants, after consulting with counsel, made an informed, deliberate and voluntary choice that their interests would be best served by pleading guilty to a lesser degree of the crime charged and by the likelihood that the sentence the Judge would impose would be less than if they were to stand trial and be convicted."

He went on to state that the hearings which would be required by the retroactive application of *Jackson* v. *Denno* would result "in profitless speculation and . . . an inquiry where no certain answers are possible" because of the virtual impossibility of reconstructing the prosecution's original case after the lapse of time.

Judge Lumbard presented statistics which showed that about 95% of all convictions are based on pleas of guilty.

He pointed out that the system is advantageous to all concerned and contended that if the decision to plead guilty could be placed in jeopardy many years later the State will have been deprived of a substantial part of the benefit of such a system. "Absent any fraud or overreaching existing at the time of the plea", neither the State nor the defendant should be able to reopen it. He acknowledged that

> "Were there any reason to suppose that injustice has resulted from the taking of guilty pleas in New York courts in cases where prisoners, represented by counsel, had confessed, further inquiry would at least be justified. But no such suggestion has been made; no cases of injustice are cited and so far as I am advised there have been no such cases."

Judge Lumbard stated that he would confine *Jackson* v. *Denno* to those cases in which New York had used a confession at trial over an objection that it was coerced on the theory that in the case of guilty pleas:

> "The unconstitutionality of the pre-*Jackson* procedure is relevant only for its supposed impact in deterring defendants from going to trial and thereby inducing their pleas of guilty. This impact, which would be virtually impossible to determine since it requires reconstructing the defendant's state of mind, is unquestionably remote and speculative. It cannot be doubted that the existence of the pre-Jackson procedure has had a far more remote effect on the reliability of the process for determining guilt . . . in plea of guilty situations than it has had in cases which guilty went to trial"

Moreover, he pointed out that going to trial was not useless since even under that procedure some confessions were in fact held involuntary. Judge Lumbard then reviewed

the petitions in light of the majority holding and found that, even under those principles, Ross and Dash were not entitled to evidentiary hearings.

A dissenting opinion by Judge Moore questioned the applicability of the standards for holding habeas corpus hearings stated by this Court in *Townsend* v. *Sain,* 372 U. S. 293 (1963) to convictions based upon pleas of guilty. Judge Moore also stated that the majority had failed in its effort to state a rule which would aid the district courts in reviewing guilty pleas since it had purported to utilize motivation for pleading as the test and then proceeded to order a hearing in Ross where the facts were strongest for denying a hearing under that test.

The dissenting opinion written by Judge Friendly was premised on his determination that

> "No decision of the Supreme Court has held or even intimated that an accused who has been convicted upon a guilty plea, made on the advice of counsel after full explanation of its consequences and without coercion or trickery of any sort by the state, and thus 'voluntary' in the ordinary use of language, is entitled to have the conviction set aside because the plea was influenced in greater or less degree by a previous act of the state in violation of his constitutional rights."

He challenged the reliance of the majority on language from *Machibroda* v. *United States,* 368 U. S. 487 on the ground that that case involved an unkept promise regarding sentence and stated that a decision by this Court that Machibroda had alleged enough facts to require a hearing was not determinative of "the altogether different and highly important issue" raised in the instant cases. He challenged as well the majority's reliance upon *Pennsylvania ex rel. Herman* v. *Claudy,* 350 U. S. 116 as also involving the use of language as authority in total disregard of the context in which it was stated.

Judge Friendly criticized the majority for failing to set forth "intelligible guidelines" for when a hearing should be held or how the district courts should rule on petitions after holding hearings:

> "It is enough that the illegal confession was *a* factor or must it have been an *important* factor? And how can anyone tell? Isn't a confession almost inevitably an important factor except when the other evidence is overwhelming? Even if the standard were framed a bit more rigidly so as to require a showing that the plea would not have been made 'but for' the confession, the trial courts are being given a job impossible of successful performance."

Judge Friendly sharply disputed the likelihood that the rule of these cases would be limited to pre-*Jackson* confession cases since he did not find persuasive the argument that the pre-*Jackson* procedure was, in fact, so unfair as to influence a decision to plead, especially in view of the availability of federal habeas corpus to test the confession. Finally he observed that "[i]t is high time to recall that, even with respect to criminal defendants, a bargain is a bargain if made by an intelligent man with full protection of the court and on the advice of counsel".

Reasons for Granting the Writ

1. The decision below represents a significant departure from prior decisions of this Court.

How the prosecution obtains its evidence and why a defendant decides to plead guilty are mutually exclusive questions. Under every decision of this Court, the former question has had relevance only insofar as the evidence was in fact utilized at trial. Therefor, the validity of such

evidence may not be examined when a defendant collaterally attacks his plea of guilty. For, as this Court has held in *Kercheval* v. *United States,* 274 U. S. 220, 223:

> "A plea of guilty differs in purpose and effect from a mere admission or an extra-judicial confession; it is itself a conviction. Like a verdict of a jury it is conclusive. More is not required; the court has nothing to do but give judgment and sentence."

The Court below reached a contrary result solely by speculating, on the basis of the conclusory allegations in these petitions, that there is a causal connection between how evidence is obtained and the plea itself. This unreasoned and unfounded speculation should not be the basis for permitting a convicted defendant to repudiate his guilty plea by way of federal collateral attack, especially since the Court has provided no comprehensible standards for determining whether or not a plea is voluntary. The rule as stated insures the likelihood of amorphous collateral evidentiary hearings in the vast majority of all final state judgments of conviction, past and future. The literally staggering impact of such a result demonstrates the urgency of the instant petition.

It is by no means urged that a guilty plea is never open to collateral attack, but it is urged that the nature of that attack must be directed to whether the plea was knowingly and voluntarily made "after proper advice and with full understanding of the consequences." *Kercheval* v. *United States, supra* at 223; *Waley* v. *Johnston,* 316 U. S. 101; *Walker* v. *Johnston,* 312 U. S. 275. Thus, a knowing plea traditionally is entered when the defendant understands the nature of the charge against him, knows that he can go to trial and put the prosecution to its case and appreciates the consequences of his plea, including the waiver of any

defense he might have. The fact that the situation has been explained to a defendant by counsel acting in his behalf is a critical factor in determining the knowing nature of the plea. *Cf. Walker* v. *Johnston, supra; Von Moltke* v. *Gillies,* 332 U. S. 708. If the plea is a result of a bargain which is not kept, it cannot be said that it was entered with knowledge of the consequences. Similarly, a plea is voluntary where it has not been entered as the result of any threats or promises overbearing the will of the defendant and forcing him to act against his choice. *Machibroda* v. *United States,* 368 U. S. 487; *United States* v. *Tateo,* 214 F. Supp. 560 (S.D.N.Y. 1963).

Certainly, a trial court should not accept a guilty plea which is not knowingly and voluntarily offered. The nature of the inquiry which should be made is evidenced (although not constitutionally mandated) by Fed. R. Cr. Proc. 11 which provides:

> "A defendant may plead not guilty, guilty, or with the consent of the court, *nolo contendere.* The court may refuse to accept a plea of guilty, *nolo contendere* without first addressing the defendant personally and determining that the plea is made voluntarily with understanding of the nature of the charge and the consequences of the plea. If a defendant refuses to plead guilty or if a defendant corporation fails to appear the court shall enter a plea of not guilty. The court shall not enter a judgment upon a plea of guilty unless it is satisfied that there is a factual basis for the plea."

According to this Court:

> "[T]he Rule is intended to produce a complete record at the time the plea is entered of the factors relevant to the voluntariness determination." *McCarthy* v. *United States,* —— U. S. ——, 37 U.S.L. Week 4285, 4287 (April 2, 1969).

The nature of the evidence available to the prosecution forms no part of the inquiry. Under the decisions below however, the most scrupulous compliance with Rule 11 would not prevent collateral inquiry into matters not relevant to the nature of the plea itself. *McCarthy* v. *United States, supra* at 4287. As Judge Friendly pointed out in dissent: "Despite superficial similarity this issue is actually quite different from determining whether a plea of guilty was 'voluntary' in the traditional sense." The factors considered in the colloquy at the time of the offer of the plea should ordinarily be dispositive of any claimed defect in the plea (see *United States ex rel. Martin* v. *Fay*, 352 F. 2d 418 [2d Cir. 1965]; *United States* v. *Shillitani*, 16 F.R.D. 336 [S.D.N.Y. 1954]), but under the Rule below, they never could. Significantly, the Court below entirely ignored the colloquies in all of the instant cases, except *Richardson*.

As a practical matter, any plea is "induced" by such factors as the likelihod of conviction, possible defenses and challenges to the prosecution's case, the possibility of a plea to a reduced charge and the possibility of a more lenient sentence. It is for the defendant and his lawyer to weigh the alternatives; it is not for the Court to weigh the evidence in lieu of a trial in order to advise a defendant of the sure outcome should he decide to go to trial. Once the plea is freely decided on, it operates as a waiver of all non-jurisdictional defects. *McCarthy* v. *United States, supra; United States ex rel. Glenn* v. *McMann*, 349 F. 2d 1018 (2d Cir. 1965), *cert. denied* 383 U. S. 915.

While evidence may induce a plea, its nature and probative value do not. The only appropriate way to test evidence is by challenge at the time it is offered at a trial. Indeed, the belief that material evidence is open to challenge is a strong inducement to proceed to trial.

To claim that the belief that evidence has been illegally obtained taints the alternatives available to the defendant

and thus infects the plea (*cf. Harrison* v. *United States,* 392 U. S. 219), begs the question. The only resolution of such a claim would be to afford to pleading defendants the same forum as non-pleading defendants and leave them, by virtue of a probable reduced charge or sentence, with the best of both worlds while requiring the courts, in effect, to conduct trials or lengthy proceedings in all cases. All of the instant cases, it must be recalled, involve *alleged* illegality, not established misconduct. Contrast *Fay* v. *Noia,* 372 U. S. 391.

That the Circuit Court failed to recognize the nature and effect of a guilty plea is evidenced by its reliance on the language in its own decision in *United States ex rel. Rogers* v. *Warden,* 381 F. 2d 209 (2d Cir. 1967), to the effect that: "There is nothing inherent in the nature of a plea of guilty which *ipso facto* renders it a waiver of defendant's constitutional claims" (*Id.* at 213). This language, of course, flatly contradicts, the holdings of this Court in *Kercheval* v. *United States, supra* at 223 and *McCarthy* v. *United States, supra* at 4287. The Court went on in the *Rogers* case to hold that, because New York afforded defendants who pleaded guilty an opportunity to test on appeal the accuracy of an adverse determination of a pretrial motion to suppress evidence (N. Y. Code Crim. Proc. § 813-c), the issue had not been "waived" for federal habeas corpus purposes notwithstanding the fact that no direct attack was made on the plea of guilty. The Second Circuit is thus the only federal appellate court which accords relief to a petitioner who has pleaded guilty but seeks later to raise an evidentiary claim not even connected with the plea.

Although in *Rogers,* the Court claimed that its decision was limited to the unique New York procedure, it has employed the same erroneous "waiver" rationale to the instant cases. By this rationale the Second Circuit has

created the untenable situation of assessing waiver of a claim by reaching the merits of the very issue which is claimed to be waived. Obviously, the merits of a claim have no relevance to why it was or was not raised except as it may be believed to be without merit.

The dilemma is apparent; the confusion and impact incalculable. To escape the dilemma, the Court of Appeals purports to hold that the mere claim that illegally obtained evidence induced the plea is not sufficient to mandate a hearing or invalidate the plea. This, however, is not the result of their decisions. Typically, a claim that evidence "induced" the plea will be coupled with a claim that counsel in some manner either failed to explain or appreciate the evidentiary considerations. In such circumstances, it seems clear, the holdings below would require evidentiary exploration of the allegations and a belated collateral assessment of whether or not counsel was in fact correct. If he was, the matter seems to be at an end. However, such an inquiry bears no relation to the understanding nature of the plea and is simply the evidentiary hearing on the purportedly waived claim. If counsel was not correct, then there must be a hearing on "substantial motivation", a highly speculative inquiry at which the petitioner's testimony is a foregone conclusion. To rebut it, the State would have to produce the case it had abandoned in midstream perhaps many years before. If the hearing is to concern itself with the understanding nature of the plea, then the inquiry would be directed to the traditional voluntariness factors already considered and the evidence again would be irrelevant except as it provides a springboard for ordering a hearing while playing no part in the hearing itself. The Second Circuit does not specify the direction a hearing should take but obviously, under any view, the evidentiary allegation plays no part. This is also obvious from the fact that, in each case, the Second Circuit found other grounds to be considered at a hearing although

these are almost all related to the evidentiary claim. In any event, the evidentiary claim is clearly the basis for all of the decisions and all of the allegations were wholly conclusory.

The absence of any adequate guidelines for the mandated hearings was succinctly set forth by Judge Friendly in his dissenting opinion:

> "The court gives almost no aid concerning the standard for ruling on petitions after a hearing has been held. Is it enough that the illegal confession was *a* factor or must it have been an *important* factor? And how can anyone tell? Isn't a confession almost inevitably an important factor except when the evidence is overwhelming? Even if the standard were framed a bit more rigidly so as to require a showing that the plea would not have been made but for the confession, the trial courts are being given a job impossible of successful performance."

In short, the Second Circuit has failed completely, in mandating wholesale hearings, to appraise the district courts of the ultimate fact in issue.

It is clear from the opinions below, moreover, that the assessment of voluntariness is to be made on the basis of the law at the date of the petition for collateral relief, and not at the date of the plea itself. Thus, the Court relies upon the unconstitutionality of the procedure for testing confessions which existed at the time of the guilty pleas in these cases. By doing so, it jeopardizes all guilty pleas in New York prior to June 22, 1964, where a confession allegedly formed a substantial part of the evidence. However, these are not cases in which there was any doubt at the time about the right to attack the legality of a confession. *Cf. United States ex rel. Carafas* v. *LaVallee*, 334 F. 2d 331 (2d Cir. 1964), *cert. denied* 381 U. S. 951 (1965). Long before these defendants' convictions and this Court's decision in *Jackson* v. *Denno, supra,* it had been settled that involuntary confes-

sions could not be introduced in evidence at state or federal trials. And at the time of the instant convictions, the "New York" system for testing voluntariness had gained the sanction of state and federal courts (*Stein* v. *New York*, 346 U. S. 156), was considered valid, and was commonly utilized by defendants who had *bona fide* claims of inadmissibility. Moreover, it was entirely possible in each of these cases that the trial judge might have found the confession voluntary or involuntary as a matter of law, thereby never reaching the *Jackson* problem. Or, the confessions might not have been introduced at all. Therefore, it is not "accurate to say that going to trial and contesting the voluntariness of their confessions was a useless procedure for defendants who claimed that their confessions had been coerced." Dissenting opinion of Chief Judge Lumbard. In any event, as Circuit Judge Friendly observed in his dissent to the instant cases:

> "While the procedure prescribed by Jackson is a substantial improvement, the previous New York practice was a long way from denying an accused a reasonable opportunity to have the validity of his confession determined. The majority in Jackson conceded that New York's belief in the fairness of its procedure was 'not without support in the decisions of this Court', 378 U. S. at 395 notably *Stein* v. *New York*, 346 U. S. 156 (1953), and four Justices found nothing constitutionally wrong with it. Furthermore, there was always the opportunity to resort to federal habeas corpus in the event of conviction and to have the voluntary nature of the confession tested there. The case where a defendant otherwise willing to stand trial was forced into a guilty plea by the difference between pre-Jackson and post-Jackson procedures with respect to confessions, is thus a construct of the fertile brains of defense lawyers without counterpart in reality."

In the instant cases, for example, only Williams raised the issue in his petition.

See also *Pinto* v. *Pierce*, 389 U. S. 31 (1967) in which this Court emphasized that it "has never ruled that all voluntariness hearings must be held outside the presence of the jury, regardless of the circumstances."

Thus, it is only the wisdom of hindsight which enabled the Circuit Court to characterize a defendant's submission to the *Stein* procedure as a "hazard" and to conclude that the pleas in each of these cases were "substantially motivated by * * * coerced confession[s] the validity of which [the defendants were] *unable, for all practical purposes, to contest.*" (Emphasis supplied.)

The net effect of relying upon the subsequent unconstitutionality of the State procedure is to place the defendant who pleaded guilty in a better position than his counterpart who went to trial and who failed to object to introduction of the confession (*People* v. *Huntley*, 15 N. Y. 2d 72 [1965]; *United States* v. *Indiviglio*, 352 F. 2d 276 [2d Cir. 1965], *cert. denied* 383 U. S. 907) when no reason exists for drawing such a distinction. In neither case has the defendant made a record which is capable of review. Moreover, the inequity created by the distinction is in itself a reason why persons who challenge their guilty pleas should not be able to rely *at all* upon the alleged unconstitutionality of evidence.

Indeed, to the extent that the Court below found a pretrial motion to suppress constitutionally mandated, its holding conflicts with *Jackson* v. *Denno*, itself, which specifically recognized that a forum for testing a confession could be provided during the trial itself. 378 U. S. at 378 n. 8, 386 n. 13. The Court below held, however, that a plea could not safely be advised until "a fair hearing by the state court has been held on a motion to suppress the confession and suppression has been denied * * *".

This conflict with *Jackson* effectively elevates §§ 813-c, g of the New York Code of Criminal Procedure to a constitutional requirement. Sections 813-c, g provide for such a pre-trial motion to be made to test, respectively, the legality of evidence which has been seized and of confessions which the prosecution intends to introduce (§ 813-f).* However, the enactment of these provisions was not constitutionally required. This Court has never announced a requirement that a defendant know *prior to pleading* whether or not the evidence which may be used against him at trial is constitutional. All that is required as a matter of due process is that there be an opportunity to test the evidence at *some* time. Significantly, in conflict with its holding in the instant cases, the Second Circuit in *United States ex rel. Rogers* v. *Warden,* 381 F. 2d 209 (2d Cir. 1967) *itself* recognized that §§ 813-c and g are not constitutionally required.

To the extent that the instant opinions mandate a pre-trial hearing they also may require an appeal from the judgment entered upon a plea after denial of the motion, as the New York statute provides. For if the defendant is entitled to collateral review, *a fortiori* he would be entitled to appellate review.

Moreover, the rationale of the Second Circuit rule, by looking at the law as of the date of the petition, would give retroactive effect to exclusionary rules which this Court has held are not retroactively applicable to the defendant who chose to go to trial, *e.g.,* in the case of searches which took place before *Mapp* v. *Ohio,* 367 U. S. 643 (1961) or statements given prior to *Miranda* v. *Arizona,* 384 U. S. 436 (1966) and *Escobedo* v. *Illinois,* 378 U. S. 478 (1964). For to the extent that a reviewing court may take into

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* Section 813-c became effective in April, 1962 and § 813-g became effective in July, 1965. Prior to their enactment the evidence in issue could only be challenged upon its introduction at trial.

account an allegation that the plea was induced by certain evidence it is logically irrelevant whether or not that evidence was regarded as constitutional at the time. And, of course, the holdings below would permit an attack on a guilty plea to take into account an allegation that the plea was induced by the existence and threatened use of such unconstitutional evidence as identification on the basis of an improper lineup (*Stovall* v. *Denno*, 388 U. S. 293 [1967]) or introduction of a co-defendant's confession (*Bruton* v. *United States*, 391 U. S. 123). This result necessarily follows from the reliance of the Second Circuit on the fact that the *Stein* procedure was subsequently held to be inadequate in *Jackson* v. *Denno*, *supra*.

2. The impact of the holdings below on past and future cases is substantial, especially in view of their conflict with New York law.

As Chief Judge Lumbard pointed out, the percentage of state court convictions resting on guilty pleas is enormous. Moreover, the percentage of federal convictions resting on such pleas is comparable (*McCarthy* v. *United States*, —— U. S. ——, 37 U. S. L. Week 4286, n. 7). It must be assumed that in a large proportion of such convictions there is either a statement or tangible evidence which can be made the subject of an effort to suppress, albeit a frivolous effort. If evidentiary hearings, after conviction, are to be held on a claim not raised before conviction, the burden on the courts will surpass comprehension.

When the holdings below are coupled with the fact that they are retroactive in their application, the impact is even more overwhelming. As we have suggested, *supra*, p. 22, the State, which in each case discontinued its prosecution in reliance upon the defendant's action, must attempt to reconstruct its case at a later date of the defendant's choosing. The difficulties inherent in this are all too obvi-

ous. Witnesses may have died. The defendant's attorney may no longer be available. It is not inconceivable that there are cases in which the relevant records fail to disclose whether or not evidence was actually seized or a confession given. One such example is the case of an oral statement.

The opportunities for fabrication are similarly obvious. As Circuit Judge Friendly noted:

> "A hearing must be had whenever a prisoner makes 'particularized allegations as to how that confession rendered his plea involuntary.' This test will speedily become well known in the prisons and is exceedingly easy to meet; the error made by the relator in *United States ex rel. Rosen* v. *Follette,* decided herewith, will not be repeated."

Moreover, many cases each year are litigated in the state courts on the grounds now deemed adequate by the Second Circuit to raise a triable issue. These are rejected as a matter of law by the New York courts on the authority of *People* v. *Nicholson,* 11 N. Y. 2d 1067 (1962), and there is no indication that New York has any intention of abandoning that rule. Significantly, even the dissenters in *People* v. *Dash,* 16 N. Y. 2d 493, did not rely on the evidentiary claim.

The Second Circuit stated that it found its rule to be apparently consistent with that of at least five other circuits. But see: *Watts* v. *United States,* 278 F. 2d 247 (D. C. Cir. 1960); *Moore* v. *Rodriguez,* 376 F. 2d 817 (10th Cir. 1967); *Lattin* v. *Cox,* 355 2d 397 (10th Cir. 1966); *Sims* v. *United States,* 272 F. Supp. 577 (D. Md. 1966), affd. 382 F. 2d 294 (4th Cir. 1967). Moreover, the purported consistency in the Circuits relied on is superficial. Virtually every jurisdiction agrees that a voluntary plea of guilty waives all non-jurisdictional defects. Each jurisdiction,

however, takes a different approach to the additional allegation of "inducement" and even within each circuit the approaches are not uniform. Compare, *e.g., Reed* v. *Henderson,* 385 F. 2d 995 (6th Cir. 1967) with *Humphries* v. *Green,* 397 F. 2d 67 (6th Cir. 1968); *Carpenter* v. *Wainwright,* 372 F. 2d 940 (5th Cir. 1967) with *Busby* v. *Holman,* 356 F. 2d 75 (5th Cir. 1966); and *Doran* v. *Wilson,* 369 F. 2d 505 (9th Cir. 1966) with *Thomas* v. *United States,* 290 F. 2d 696 (9th Cir. 1961).

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Dated: New York, New York, May 23, 1969.

Respectfully submitted,

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APPENDIX A

District Court Opinions—Ross.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

May 25, 1967

UNITED STATES OF AMERICA ex rel. WILBERT ROSS,

Relator,

against

DANIEL MCMANN, as Warden of Clinton Prison, Dannemora, New York,

Respondent.

MEMORANDUM AND ORDER

The relator, now in State custody, seeks a writ of habeas corpus.

PERTINENT ALLEGATIONS IN THE PETITION

In May, 1954, while in State custody, the relator was taken to the office of the District Attorney and questioned about the commission of a murder; he was coerced into signing a statement, confessing the crime; his request to be permitted to consult with his attorney was refused and he was not advised of his right to remain silent;

In October, 1954, he was arraigned on an indictment, charging him with the commission of first degree murder;

Five or six weeks later, he requested his court appointed lawyer, Mr. Harvey Strelzin, to seek the return of the con-

fession; Strelzin urged that no such action be taken; if he persisted in demanding a trial, Mr. Jenkins, a witness for the People would testify against him and he would get the chair;

In February, 1955, he was brought into court, represented by counsel, and informed that the District Attorney was willing to accept a plea to second degree murder and that his sentence would be twenty years to life; he thereupon pleaded guilty to that charge;

March 14, 1955, judgment of conviction was entered, including a sentence of forty-five years to life;

March 23, 1965 (ten years later) he verified a petition for coram nobis, seeking the vacating of the judgment of conviction;

May 21, 1965, the petition was denied without a hearing;

May 24, 1965, the order thereon was entered;

June 10, 1965, reargument of the motion was granted;

Sept. 15, 1965, the original decision was adhered to;

July 5, 1966, The Appellate Division of the Supreme Court, Second Department, affirmed the said order.

Jan. 10, 1967, leave to appeal to the State Court of Appeals was denied;

No appeal was taken directly from the judgment of conviction.

THE GROUND URGED IN SUPPORT OF THE PRESENT PETITION

That the relator's plea of guilty was involuntary and induced by threats.

Appendix A

A Plea of Guilty Constitutes A Waiver of All Non Jurisdictional Defects In Any Prior Stage of Proceedings Against A Defendant, Including Defects In A Preliminary Hearing

In United States ex rel. Glenn v. McMann, 349 F. 2d 1018, 1019, the court stated:

> "Appellant claims that his plea of guilty was unconstitutionally coerced by the existence of a confession that had been wrung from him involuntarily. • • •
>
> "A voluntary guilty plea entered on advice of counsel is a waiver of all nonjurisdictional defects in any prior stage of the proceedings against him. • • •
>
> "Petitioner's motions are denied. The respondent's cross-motion to dismiss the appeal is granted."

Petitioner Glenn's application to the Supreme Court of the United States for a writ of certiorari was denied. See United States ex rel. Glenn v. McMann, 383 U. S. 915.

People v. Nicholson, 11 N Y 2d 1067, decided July 6, 1962, cited and relied upon by the relator fails to support his position. The court therein, at page 1068, said:

> "A defendant who has knowingly and voluntarily pleaded guilty may not thereafter attack the judgment of conviction entered thereon by coram nobis or other post-conviction remedy on the ground that he had been coerced into making a confession and that the existence of such coerced confession induced him to enter the plea of guilty. If a defendant desires to contest the voluntariness of his confession, he must do so by pleading not guilty and then raising the point upon the trial; he may not plead guilty and then, years later, at a time when the prosecution is perhaps unable to prove its case, assert this alleged constitutional vio-

lation. The issue as to whether the confession was illegally obtained is waived by the guilty plea."

The Nicholson case, supra, was cited with approval in People v. Dash, 16 N Y 2d 493, decided April 22, 1965.

The Court concludes that the relator's motion lacks merit and that the petition should be dismissed. The papers will be filed without payment of fees.

A copy hereof is being mailed to the respondent for delivery to the relator.

WALTER BRUCHHAUSEN

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United States District Judge

Appendix A

District Court Opinions—Dash.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA ex rel. FOSTER DASH,

Petitioner,

against

HON. HAROLD W. FOLLETTE, Warden, Green Haven Prison, Stormville, N. Y.,

Respondent.

CANNELLA, J.

Petitioner's pro se application for a writ of habeas corpus is denied.

Petitioner was indicted together with three defendants for robbery in the first degree, grand larceny and assault on February 9, 1959.

On April 6, 1959, together with one co-defendant, the petitioner pleaded guilty to robbery in the second degree and was sentenced as a second offender to a term of 8 to 12 years on August 3, 1959. Two separate coram nobis applications were denied on January 29, 1963 and February 26, 1963, respectively. The grounds raised are similar to the ones raised in this petition. The orders were affirmed by the Appellate Division, First Department, 21 A. D. 2d 978, and affirmed by the New York Court of Appeals, 16 N. Y. 2d 493.

Petitioner alleges: (1) that his plea of guilty was the product of a coerced confession, (2) that his plea of guilty was coerced by the trial court by telling him he would get the maximum penalty if found guilty after trial.

In regard to the first contention, it is well settled that a voluntary plea of guilty entered on advice of counsel constitutes a waiver of all non-jurisdictional defects in any prior stage of the proceedings against the defendant. *United States ex rel. Glenn* v. *McMann*, 349 F. 2d 1018 (2d Cir. 1965); *United States ex rel. Swanson* v. *Reincke*, 344 F. 2d 260 (2d Cir. 1965); *United States ex rel. Boucher* v. *Reincke*, 341 F. 2d 977 (2d Cir. 1965). Petitioner therefore cannot succeed on the basis of his first contention.

With respect to the second contention it appears that the prosecutor in the state court proceedings filed an affidavit in which he categorically stated that the trial judge never threatened the defendant. See, *People* v. *Dash*, 16 N. Y. 2d 493 (1965).

Further the transcript relating to the entry of petitioner's plea of guilty clearly indicates that the defendant made an intelligent and uncoerced choice and that no promises or threats were made to him.

So ordered.

Dated: February 2, 1966.

s/ John M. Cannella

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U. S. D. J.

Appendix A

District Court Opinions—Richardson.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA ex rel. WILLIE RICHARDSON,

Petitioner,

against

WARDEN OF CLINTON PRISON,

Respondent.

MEMORANDUM DECISION AND ORDER

BRENNAN, Judge

This is another of the now prevalent applications for a writ of habeas corpus directed to this court by a state court prisoner and based upon the contention that his plea of guilty to a reduced charge in a state court is invalid because same was induced by an alleged coerced confession.

It is alleged in the petition that on or about March 24, 1963 the petitioner attempted to act as a peacemaker in an altercation between two relatives, each of whom died as the result of stab wounds inflicted upon them. Upon petitioner's arrest, he was brought to the police station and after questioning, he signed a confession implicating himself in the homicides involved. He alleges in a conclusive manner that his statement or confession resulted diretely from police coercion after he had requested and been denied the right to communicate with an attorney. Petitioner was subsequently indicted in a two count indictment which

charged him with the crime of murder in the first degree. Two attorneys were assigned as counsel to represent the petitioner and on July 22, 1963 in the presence of such counsel, he entered a plea of guilty to the crime of murder in the second degree upon the first count of the indictment and to cover the second count thereof. He was thereafter sentenced to be confined for from thirty years to life and is detained under the resulting commitment.

On or about June 30, 1964, petitioner sought by motion in the state court to vacate the judgment of conviction upon the contention that his plea was induced by the fact that he had been coerced into confessing his guilt. Relief was on July 27, 1964 denied in the state court upon the authority of Peo. v. Nicholson, 11 N. Y. 2d 1067. An appeal was taken. The action of the lower court was affirmed without opinion on May 27, 1965. Peo. v. Richardson, 23 A. D. 2d 969. Permission to appeal to the Court of Appeals was denied June 8, 1965. This application, verified July 2, 1965, followed.

The present application fails on its face to show that the contention, now advanced, had been presented to the state courts and in order to establish the fact, the petitioner has loaned to this court copies of the appellant's and respondent's briefs in the Appellate Division which show that the present contention was in fact submitted to that court. It is therefore concluded that state court remedies have been exhausted.

Through the cooperation of the Attorney General and the District Attorney of the County of New York, a photostat transcript of the minutes of the proceedings in the Supreme Court, New York County, on July 22, 1963, when petitioner's plea was entered and on October 9, 1963 when sentence was imposed, have been made available by the District Attorney of New York County. The petition, together with the documents mentioned above, are before

this court in the matter of the determination of the question as to whether the requested writ should issue. They are held to be sufficient to conclude that petitioner's plea was voluntarily entered and that no hearing is necessary. U. S. ex rel. McGrath v. LaVallee, 319 F. 2d 308 at 312 and cases cited. The facts disclosed will be briefly discussed.

As already indicated, the petitioner was represented by assigned counsel at the pertinent times involved. There is no allegation that such representation was ineffective. There is no allegation that petitioner was acting in any manner under either a physical or mental handicap. That petitioner was experienced in the matter of law violations is apparent from the allegation of the petition which contains a reference to him as a parolee at the time of the incident involved.

The transcript of the proceeding had at the time of the entry of the decree is somewhat lengthy and it is difficult to understand from a reading thereof how any court could have taken additional safeguards to make certain that the plea was voluntarily and understandingly entered. Request was made by counsel to withdraw the "not guilty" plea previously entered and to plead guilty to Count 1 of the indictment. After the court requested that the petitioner pay attention, he repeated the request of counsel made above. The petitioner indicated that such course of action was desired by him and that he had discussed same with both counsel. In answer to the court's question as to whether or not he had been threatened or whether promises had been made to him as to the sentence to be imposed, the petitioner replied in the negative. On two occasions, he advised the court that the taking of the plea was of his "own free will and volition". The court then asked the following question "Now, did you, on or about March 24, 1963 in the County of New York, wilfully and

feloniously strike Rosalie Smith with a knife, thereby causing her death?" The defendant replied "Yes, sir." The court then took the plea. It is impossible for this court to understand how the trial judge could have more conclusively established that the plea of guilty was both understandingly and voluntarily entered. Almost three months later, when sentence was imposed, although opportunity was afforded, the petitioner raised no question as to the validity of his plea. Here the petitioner received the benefit of a plea to a reduced charge and the quashing of a further charge of a capital offense. He is now apparently dissatisfied with the bargain. The circumstances indicate that subsequent post-conviction attempts to obtain relief were the result of an afterthought prompted, no doubt, by legal education afforded during petitioner's subsequent confinement.

The law requires little discussion. This court is not required to blindly accept the allegation of the petition as presumptively valid. Edge v. Wainwright, 347 F. 2d 190. This rule would seem to apply, where a state of mind appears to be contradicted by a showing of the facts. It has long been held that a voluntary guilty plea, entered upon advice of counsel, is a waiver of all non-jurisdictional defects in any prior stage of the proceedings against a defendant in a criminal case. This principle has been recently repeated by our Circuit Court of Appeals in U. S. ex rel. Glenn v. McMann, decided August 26, 1965 and in U. S. ex rel. Martin v. Fay, decided November 8, 1965. A reference to the opinion in U. S. ex rel. Glenn v. McMann, supra, would indicate that petitioner's reliance upon the language in U. S. ex rel. Vaughn v. LaVallee, 318 F. 2d 499, is misplaced. The decision here, that the state court record is sufficient and satisfactory for the determination of the issues involved (see U. S. ex rel. McGrath v. LaVallee, supra, at page 312), may well rest upon the statement

found in U. S. ex rel. Martin v. Fay, supra, to the effect that the facts and circumstances including the colloquy between the judge, who took the plea and imposed the sentence, and the petitioner are decisive in denying substance to the petitioner's present contention.

The court's attention is just called to the fact that although the transcript of the state court proceedings, referred to, seems to be a photostat of the original, same is not certified. There is no reason for this court to doubt the correctness or the completeness of such transcript but it is deemed advisable to return same to the District Attorney of New York County with the request that same be certified and returned to this court when it will be filed as a part of the record in this proceeding. The briefs, loaned by the petitioner and referred to above, will be returned to him with the understanding that if an appeal is to be taken from this decision, that same must be made available to the appellate court.

For the reasons indicated above, it is

ORDERED the application be and the same is hereby denied.

STEPHEN W. BRENNAN,
Senior U. S. District Judge.

Dated: December 2, 1965.

Appendix A

District Court Opinions—Williams.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

66-Civ. 2304

UNITED STATES OF AMERICA ex rel.
McKINLEY WILLIAMS,

Relator,

v.

HAROLD W. FOLLETTE, as Warden of
Green Haven State Prison,

Respondent.

CROAKE, District Judge

MEMORANDUM

In a memorandum decision filed on September 13, 1966, the petition of the relator for a writ of habeas corpus was dismissed by ths court for failure to exhaust state remedies. Relator now moves for reargument. Since it appears from the additional papers filed upon the instant application that the exhaustion requirement should be held to have been complied with in the circumstances, the motion for reargument will be granted. The September 13 order is to be vacated and the petition will be considered upon the merits.

In his petition, relator urges that his conviction be set aside on the grounds that a confession was coerced prior to his plea of guilty, and that he should not be deemed to have waived his right to challenge the confession, because,

under the then existing procedure for determining the voluntariness of confessions, he could not have had a fair trial. Relator supports this ingenious argument by relying on *Jackson* v. *Denno*, 378 U. S. 368 (1964), the case which invalidated the New York procedure for determining the voluntariness of confessions.[1]

The arguments in support of the application have been carefully considered and it appears that the petition should be and is denied. As the court of appeals said in *United States ex rel. Glenn* v. *McMann*, 349 F. 2d 1018, 1019 (2d Cir. 1965): "A voluntary plea entered on advice of counsel is a waiver of all non-jurisdictional defects in any prior stage of the proceedings." *Accord, United States ex rel. Martin* v. *Fay*, 352 F. 2d 418 (2d Cir. 1965). Under the circumstances alleged herein, this court is of the opinion that the plea of the relator was not involuntary. It is clear from the papers submitted that the disputed plea was made in open court with counsel present.[2]

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[1] The ingenuity of the relator is further evidenced by the manner in which he "satisfied" the requirement that state remedies be exhausted before seeking relief in federal court. When the petition to this court was originally filed, the affidavit of the attorney general stated that petitioner had an appeal from the denial of a coram nobis application pending in the New York courts. To verify this, the court, sua sponte, requested an affidavit from the attorney general. The attorney general complied, and together with an affidavit submitted a photostatic copy of the notice of appeal. The relator received a copy of the affidavit and of the notice of appeal, whereupon he forthwith withdrew the pending appeal. Parenthetically, it might be observed that the relator has brought six coram nobis proceedings in the New York courts.

[2] The assertion by the relator that his attorney informed him that he would be pleading guilty to a misdemeanor rather than to a felony is not sufficient for this court to grant the relator's request for relief, in light of the decision in *Martin, supra*, of the colloquy between the court and the defendant at the time of the plea, and of the prior experience of the relator with the law as indicated by his record.

It should be further noted that the plea of guilty by this relator was made in March 1956, some eight years before the *Jackson* decision (1964), in which the procedure then pursued in the New York courts to determine the voluntariness of a confession was declared unconstitutional.[3] It is most difficult, therefore, to accept the assertion that the right to go to trial was relinquished because he believed he would not receive a fair determination on the issue of voluntariness.

Accordingly, the petition is denied.

So Ordered.

Dated: New York, N. Y.
October 26, 1966

Thomas F. Croake

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[3] *People* v. *Huntley*, 15 N. Y. 2d 72 (1965), the case which implemented *Jackson* v. *Denno*, provides for a separate hearing on the issue of voluntariness only as to those cases which have gone to trial.

APPENDIX B

Circuit Court Opinions—Ross and Dash.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

September Term, 1967.

(Submitted to the court
in banc October 17, 1968 Decided February 26, 1969.)

No. 492—Docket No. 32140

UNITED STATES OF AMERICA *ex rel.* WILBERT ROSS,
Relator-Appellant,

—v.—

DANIEL MCMANN, as Warden of Clinton Prison, Dannemora, New York
Respondent-Appellee.

No. 540—Docket No. 30420

UNITED STATES OF AMERICA *ex rel.* FOSTER DASH,
Petitioner-Appellant,

—v.—

THE HON. HAROLD W. FOLLETTE. Warden of Green Haven State Prison, Stormville, New York,
Respondent-Appellee.

Before:

LUMBARD, Chief Judge,
WATERMAN, MOORE, FRIENDLY, SMITH, KAUFMAN, HAYS, ANDERSON and FEINBERG, *Circuit Judges.*

Appendix B

United States ex rel. Ross v. *McMann* was argued May 9, 1968 before Lumbard, *Chief Judge,* and Smith and Anderson, *Circuit Judges.*

United States ex rel. Dash v. *Follette* was argued on June 21, 1968 before Moore and Friendly, *Circuit Judges,* and Bryan, *District Judge.*

Since similar issues of importance in determining state prisoner habeas corpus applications were involved in these cases, and in No. 32264, *United States ex rel. Oscar Leon Rosen* v. *Follette,* the court on October 17, 1968 ordered the three cases considered *in banc.*

Appeal in *United States ex rel. Ross* v. *McMann* from judgment of the United States District Court for the Eastern District of New York, Walter Bruchhausen, *Judge,* dismissing without hearing application of state prisoner for writ of habeas corpus. Reversed and remanded.

THOMAS D. BARR, New York, N. Y. (Duane W. Krohnke, New York, N. Y., on the brief), *for relator-appellant.*

JOEL LEWITTES, Asst. Attorney General, State of New York (Louis J. Lefkowitz, Attorney General, and Samuel A. Hirshowitz, First Asst. Attorney General, on the brief), *for respondent-appellee.*

Appeal in *United States ex rel. Dash* v. *Follette* from order of the United States District Court for the Southern District of New York, John M. Cannella, *Judge,* denying

without hearing petition of state prisoner for writ of habeas corpus. Reversed and remanded.

GRETCHEN WHITE OBERMAN, New York, N. Y. (Anthony F. Marra, New York, N. Y., on the brief), *for petitioner-appellant.*

MORTIMER SATTLER, Asst. Attorney General, State of New York (Louis J. Lefkowitz, Attorney General, and Samuel A. Hirshowitz, First Asst. Attorney General, on the brief), *for respondent-appellee.*

SMITH, *Circuit Judge* (with whom Judges Waterman, Kaufman, Hays, Anderson and Feinberg concur):

United States ex rel. Ross v. *McMann* is an appeal from a dismissal without hearing of an application by a state prisoner for writ of habeas corpus in the District Court for the Eastern District of New York, Walter Bruchhausen, *Judge.* Relator, confined in a New York State prison for a term of 45 years to life on conviction upon plea of guilty to murder in the second degree, petitioned the Supreme Court of the State of New York for Kings County for a writ of error *coram nobis* on the ground that his guilty plea was induced by coerced confessions. The writ was denied without a hearing, the decision affirmed without opinion by the Appellate Division, *People* v. *Ross,* 272 N. Y. S. 2d 969 (2d Dept. 1966) and leave to appeal denied by the New York Court of Appeals.

The District Court entertained the application for writ of habeas corpus, and dismissed the petition without a hearing on the ground that "a voluntary guilty plea en-

tered on advice of counsel is a waiver of all non-jurisdictional defects in any prior stage of the proceedings against him," relying on *United States ex rel. Glenn* v. *McMann*, 349 F. 2d 1018 (2 Cir. 1965), cert. denied 383 U. S. 915 (1966). In his complaint and supplemental affidavit Ross alleges that he pleaded guilty because his attorney had refused to attempt to suppress a confession which had been illegally obtained from him and had warned him that if he risked a trial, the confession and other evidence against him would surely lead to his conviction for first degree murder and sentence to the electric chair.[1] We hold that

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[1] Judge Bruchhausen in his opinion recited some of Ross' allegations, including the following:

"In May, 1954, while in State custody, the relator was taken to the office of the District Attorney and questioned about the commission of a murder; he was coerced into signing a statement, confessing the crime; his request to be permitted to consult with his attorney was refused and he was not advised of his right to remain silent;

"In October, 1954, he was arraigned on an indictment, charging him with the commission of first degree murder;

"Five or six weeks later, he requested his court appointed lawyer, Mr. Harvey Strelzin, to seek the return of the confession; Strelzin urged that no such action be taken; if he persisted in demanding a trial, Mr. Jenkins, a witness for the People would testify against him and he would get the chair;

"In February, 1955, he was brought into court, represented by counsel, and informed that the District Attorney was willing to accept a plea to second degree murder and that his sentence would be twenty years to life; he thereupon pleaded guilty to that charge;

"March 14, 1955, judgment of conviction was entered, including a sentence of forty-five years to life";

Among other allegations by Ross was the following:

"13. Sometime later he visited me again; I would say it was five or six weeks afterward, but I cannot be certain with greater specificity. I asked him then 'to get my confession back.' I recall those to have been my exact words. I meant that I wanted to repudiate the confession and have it suppressed. I

(*footnote continued on following page*)

these allegations raise a sufficient question as to the voluntariness of the plea of guilty to require a hearing before the issue is determined.

On the record before us, it appears that Ross has sufficiently raised his present claims in the state courts to satisfy the requirement of exhaustion of state remedies. On oral argument, however, it was represented that a second petition by Ross for relief by writ of error *coram nobis* has been brought to and is pending in the state courts.

(*footnote continued from previous page*)

spoke in the belief that it could be done in some way. He told me that that was completely out of the question and that at any rate the District Attorney had the gun, that nothing had changed, that Jenkins would tell his story to the jury, and that his testimony, backed up by the confession and the gun, would be enough to make 'a jury of twelve cousins' convict me and send me to the electric chair. He told me that he would 'get the first possible break' for me from the District Attorney, but that I 'would be dead by the Fourth of July' if I risked a trial.

"14. When I was brought to Court in February of 1955, Mr. Strelzin came in to see me while I was in the detention cell. I asked him again about repudiating and suppressing my confession; this seemed to exasperate him because he spoke sharply about having gone all through that before and that I had better listen to him because *he* was my lawyer and not those convicts in Raymond Street who would all be in Sing Sing in six months with all the law they knew. I told him I had not asked him on the basis of anything anyone had told me. He seemed to grow calmer at that. He told me he had spoken to the District Attorney, who was willing to allow me to plead to second degree murder, and I would get twenty years to life; he said it was an 'or else' offer, that I knew the evidence the District Attorney could present against me. He said that things were no better than before and, if anything, were much worse; the District Attorney had the confession, the gun, and Jenkins, who could be expected to tell any story to help himself. If I insisted on going to trial, well, he was my lawyer and would do what he could, though that couldn't amount to very much because 'there isn't a pair in the world to beat four aces.' Twenty to life was a long time, he wasn't going to argue that it wasn't; but it had to be better than the electric chair."

If this is determined by the District Court to be the fact, that court may defer hearing in this matter pending final determination of the action in the state courts. And, if hearing is had on the issue in the state courts, the District Court may find further hearing before it unnecessary to its determination of the merits. We reverse and remand to the District Court for further proceedings not inconsistent with this opinion.

This case raises the narrow question whether a District Court should apply the standards of *Townsend* v. *Sain*, 372 U. S. 293 (1963), in determining whether to hold an evidentiary hearing upon a habeas corpus petition where the petitioner is confined after a plea of guilty and is contending that the plea was not voluntary, because it was induced by the existence, or threatened use, of an allegedly coerced confession.

It is clear, first of all, that a plea of guilty, even where the defendant is represented by counsel, is not an absolute bar to collateral attack upon a conviction. *Waley* v. *Johnston, Warden*, 316 U. S. 101 (1942). Cf. *Pennsylvania ex rel. Herman* v. *Claudy, Warden*, 350 U. S. 116 (1956). (In *Herman*, petitioner did not have benefit of counsel.) See also *Machibroda* v. *United States*, 368 U. S. 487, 493 (1962): "A guilty plea, if induced by promises or threats which deprive it of the character of a voluntary act, is void. A conviction based upon such a plea is open to collateral attack." To paraphrase *Harrison* v. *United States*, 392 U. S. 219, 223 (1968), "The question is not *whether* the petitioner made a knowing decision to [plead] but *why*." Nor is the mere existence of a coerced confession enough to invalidate a later guilty plea by a defendant represented by counsel.

The question to be answered in any case involving a collateral attack on a conviction based upon a plea of guilty

is usually expressed in terms of whether or not the plea was a "voluntary" act. [An "involuntary" plea of guilty is inconsistent with due process of law, see *Waley* v. *Johnston, supra,* 316 U. S. at 104, and thus invalid whether made in federal or state court.] And *Townsend* v. *Sain, supra,* 372 U. S. at 312-13, requires that where the petitioner in such a case has not received a "full and fair evidentiary hearing" in a state court as to the voluntariness of the plea, a hearing be held in the federal District Court.

The question of when to hold a hearing has apparently been complicated in this Circuit, however, by confusion between the doctrine that an involuntary guilty plea may be collaterally attacked and the well-established doctrine that *if* the plea *is* voluntary, it is an absolute waiver of all non-jurisdictional defects in any prior stage of the proceedings against the defendant.

Judge Weinfeld said in *United States* v. *Colson,* 230 F. Supp. 953, 955 (S.D.N.Y. 1964), "The determination of the ultimate question of whether the defendant, at the time he pled guilty, had the free will essential to a reasoned choice, rests upon probabilities and, of course, cannot be resolved with mathematical certainty. It involves an evaluation of psychological and other factors that may reasonably be calculated to influence the human mind . . . [I]t is necessary to consider the plea of guilty against the totality of events and circumstances which preceded its entry." The determination is difficult, but it is not necessarily rendered more difficult simply because a coerced confession or an illegal search and seizure is one of the factors which may be taken into account.

In the case at bar, the court, relying on *Glenn,* found it unnecessary to make such a determination. This, we think, resulted from a too expansive reading of *Glenn.* The opin-

ion in *Glenn* may be read either of two ways: (1) the allegation of a coerced confession, *without more,* is not sufficient to raise the issue of the voluntariness of a guilty plea; or (2) an unconstitutionally coerced confession is never relevant to the issue of the voluntariness of a guilty plea. The first, more narrow reading, seems to us to state the proper rule. But the second reading (the much more likely meaning of the opinion despite the use of the word "voluntary," in view of the allegation that the plea was *coerced by the existence of* an involuntary confession) confuses the doctrine that an involuntary guilty plea may be collaterally attacked with the doctrine that if it is voluntary, a guilty plea waives prior defects in the proceedings against the defendant.

The court relied on two cases in *Glenn: United States ex rel. Swanson* v. *Reincke,* 344 F. 2d 260 (2 Cir. 1965), cert. denied 382 U. S. 869, and *United States ex rel. Boucher* v. *Reincke,* 341 F. 2d 977 (2 Cir. 1965). Neither of those cases holds that the waiver rule should operate to make an invasion of the defendant's Constitutional rights irrelevant to the issue of the voluntariness of the guilty plea.

In *Swanson,* this court affirmed the denial of relief in a habeas corpus proceeding challenging the constitutionality of the statute under which petitioner had been convicted, where a hearing had been held below. There is language in the court's opinion refusing to rest affirmance on the ground that a plea of guilty should bar collateral attack. In discussion of that issue, 344 F. 2d at 261-62, it was said:

> The cases most nearly in point but by no means exactly so concern guilty pleas proper in other respects, such as right to counsel, but lodged after the police had obtained evidence in violation of constitutional rights; a number of circuits have said such

> guilty pleas are not subject to attack [citing cases], even when induced by that evidence [citing cases].[2]

In *Boucher*, the other case cited in *Glenn*, the petitioner sought to attack his conviction based upon a guilty plea. After stating the waiver rule, this court said:

> To circumvent the effect of the guilty plea as a waiver, the petitioner asserts that his plea was induced by inadequate representation by counsel and by the fear that unconstitutionally obtained evidence would be used at his trial.

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[2] The cases cited in the quoted discussion in *Swanson* are the following: *Gonzalez* v. *United States*, 210 F. 2d 825 (1 Cir. 1954) (denial of motion to vacate judgment affirmed where conviction based on guilty plea and motion based *solely* on the ground that evidence had been unconstitutionally seized); *Hall* v. *United States*, 259 F. 2d 430 (8 Cir. 1958), cert. denied 359 U. S. 947 (1959) (denial of motion to vacate sentence affirmed where the allegation was of confession after "four hours of intensive interrogation without legal advice or counsel," but there was a *finding in the District Court* that there was a "free and voluntary" plea of guilty); *Watts* v. *United States*, 278 F. 2d 247 (D. C. Cir. 1960) (denial of Sec. 2255 motion to vacate sentence affirmed, where the motion was based on the ground that police used appellant's co-defendant's confession to induce him to confess and then to plead guilty, but *upon a full hearing in the District Court it was found*, on ample evidence, that the guilty plea was "competently, voluntarily, and intelligently entered"—the statement, picked up out of context in the West's headnote, that collateral attack on the plea of guilty would not lie, reads in full, 278 F. 2d at 250: "Finally, at the hearing we ordered, appellant frankly admitted his guilt. On this record collateral attack would not lie."); and *United States ex rel. Staples* v. *Pate*, 332 F. 2d 531 (7 Cir. 1964) (dismissal of petition for habeas corpus affirmed, where petitioner contended that his plea of guilty did not waive prior police misconduct—alleged illegal search—which "induced" his plea, but the *District Court found after a hearing* that petitioner was not entitled to a writ, and the Court of Appeals noted three times that there was no evidence presented at the hearing that the plea was not voluntary).

341 F. 2d at 981. The opinion then goes on to explain how the petitioner's representation by counsel had been entirely competent, there were no circumstances indicating an illegal search and seizure, and "There is not a shred of evidence that anyone induced him to plead guilty and the court concluded 'it was made freely, voluntarily and intelligently.'" A hearing was held in *Boucher*.

The meaning of the rule was also left somewhat uncertain by a *per curiam* opinion in *United States ex rel. Martin* v. *Fay*, 352 F. 2d 418 (2 Cir. 1965), cert. denied 384 U. S. 957 (1966). There, a denial without a hearing of an application for habeas corpus was affirmed, where appellant claimed, *inter alia*, that he pleaded guilty because a coerced confession had been obtained from him. The court said: "An examination of the facts and circumstances surrounding the taking of the plea convinces us that the plea was made voluntarily, the colloquy between the sentencing judge and appellant being decisive." The court then cited the waiver rule, as stated in *Glenn*, along with a "see also" citation to *Swanson* and *Boucher*. Judge Waterman concurred on the ground of failure to exhaust state remedies, and stated that he thought the court had made an ambiguous use of the word "voluntary," since although the petitioner had not demonstrated that a hearing would prove his allegation that his guilty plea was "required by an alleged prior forced confession," "Nevertheless, I can conceive of situations in which a plea of guilty upon the advice of counsel would have been caused by circumstances entitling the defendant to challenge his own act on the ground it was a compelled act." 352 F. 2d at 419.

We have in other cases also used language inconsistent with the District Court's reading of *Glenn* here. In *United States ex rel. Siebold* v. *Reincke*, 362 F. 2d 592 (2 Cir. 1966), a denial of a petition for a writ of habeas corpus

was affirmed *per curiam* on the ground that "the hearing before the District Court indicated that petitioner's guilty plea was not the result of unconstitutionally obtained evidence." 362 F. 2d at 593. In the course of the opinion, it was noted that "A conviction will not be sustained if it rests upon a plea of guilty which is the result of coercion, nor, perhaps, if the plea of guilty resulted from other violations of constitutional rights," citing *Vaughn, supra,* and *United States ex rel. McGrath* v. *LaVallee,* 319 F. 2d 308, 311 (2 Cir. 1963). Neither *Glenn* nor *Martin* was mentioned. In *McGrath,* the court split three ways (for no hearing, a hearing, and outright granting of a writ of habeas corpus) in a case where petitioner contended that his guilty plea had been involuntary—the claim of coercion was based upon what the trial judge said to the petitioner just before the guilty plea was entered.

The rule should be stated as follows: Where a petition for habeas corpus raises a claim that a guilty plea was not voluntary, the standards of *Townsend* v. *Sain* are applicable in determining whether to hold a hearing; and although the waiver rule means that an allegation that the petitioner's constitutional rights were violated before the plea was taken is not, standing alone, sufficient to call the validity of the plea into question, nonetheless if it is alleged that the plea was coerced in a manner spelled out in the petition, the alleged violations are not irrelevant to the issue of the voluntariness of the plea. An alleged violation of constitutional rights is simply another factor to be taken into account in determining the voluntariness of the plea.

On the other hand, the fact that the petitioner was represented by counsel and acted after consultation with counsel is also to be given substantial weight in determining the issue of voluntariness of plea.

From and after *Gideon* v. *Wainwright,* 372 U. S. 335 (1963), the state and federal courts have stressed the value and necessity of providing an accused with counsel because,

except in the very few cases of inadequate representation, the professional skill and judgment of the attorney, exercised on his client's behalf, affords the accused protection of his rights. The role of the attorney in advising a plea of guilty should not, therefore, be ignored. Even where there is evidence that a confession has been coerced, there may be factors which would justify counsel for the accused, once a fair hearing by the state court has been held on a motion to suppress the confession and suppression has been denied, to advise a plea of guilty. Therefore, a mere conclusory allegation by a prisoner without more, that the existence of a coerced confession induced his guilty plea, in the absence of any particularized allegations as to how that confession rendered his plea involuntary, should not ordinarily be considered sufficient to predicate an order for a hearing.[3] See *United States ex rel. White* v. *Fay*, 349 F. 2d 413 (2 Cir. 1965); *United States ex rel. Homchak* v. *New York*, 323 F. 2d 449 (2 Cir. 1963), cert. denied 376 U. S. 919 (1964).

The rule we have set out is apparently consistent with the views of at least the Third, Fifth, Sixth, Seventh, and Ninth Circuits. See *United States ex rel. Collins* v. *Maroney*, 382 F. 2d 547 (3 Cir. 1967) (*per curiam*); *Smith* v. *Wainwright*, 373 F. 2d 506 (5 Cir. 1967); cf. *Carpenter* v. *Wainwright*, 372 F. 2d 940 (5 Cir. 1967), a stronger case for the petitioner; *Reed* v. *Henderson*, 385 F. 2d 995 (6 Cir. 1967), dictum: "Appellant apparently attempts to circumvent the waiver attending the plea of guilty by claim-

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[3] To enable the district court to decide whether or not a hearing should be ordered, additional supporting material such as the affidavit of the attorney who represented the petitioner when he entered the guilty plea, or exhibits or affidavits of persons having knowledge of the claimed facts, should be appended, with the petitioner's own affidavit, to the original petition filed with the district court. In this case, however, we are satisfied from the petitioner's affidavit alone that he is entitled to the requested hearing.

ing that the plea was involuntary in that it was the product of, or induced by, certain coerced admissions which had been obtained from him by the police. That this may be a ground for habeas corpus relief appears to be well settled," 385 F. 2d at 996; *Shelton* v. *United States,* 292 F. 2d 346 (7 Cir. 1961), cert. denied 369 U. S. 877 (1962); *Doran* v. *Wilson,* 369 F. 2d 505 (9 Cir. 1966).

To sum up: *Glenn* says, in effect, that a "voluntary" plea of guilty wipes out all prior invasions of the defendant's constitutional rights. Whether that is correct or not depends on the meaning of "voluntary"; it must be recognized that a prior invasion of the defendant's rights, even if not sufficient after the taking of the plea to overturn the conviction, may still be entirely relevant to the issue of the plea's voluntariness. The problem is that *Glenn,* together with *Martin,* is sometimes being read by the District Courts to say that a coerced confession or other violation of a defendant's rights is *never* relevant to the issue of voluntariness, and in these cases the District Courts are relying upon representation by counsel and proper questioning by the judge at the plea taking to establish voluntariness without more, even where the allegations of the habeas corpus petition raise questions which cannot be answered by reference to the transcript alone.

This court has recently discussed the reasons why the voluntary guilty plea constitutes a waiver of all non-jurisdictional defects, *United States ex rel. Rogers* v. *Warden of Attica State Prison, supra,* 381 F. 2d 209 at 213 (2 Cir. 1967):

> There is nothing inherent in the nature of a plea of guilty which *ipso facto* renders it a waiver of a defendant's constitutional claims. Rather, waiver is presumed because ordinarily such a plea is an indication by the defendant that he has deliberately failed or refused to raise his claims by available state pro-

cedures; therefore, principles of comity and the interests of orderly federal-state relations require that he should not be allowed to present these claims to the federal courts.

A distinguishing feature of the present case, however, is that the only available state procedure by which he could contest the validity of the confession was the one declared retroactively unconstitutional in *Jackson* v. *Denno*, 378 U. S. 368 (1964). This is even more damaging to an accused than the lack of a right to appeal the intermediate order denying the Fourth Amendment motion to suppress in *Rogers, supra*, p. 214.

Faced with that hazard as his only alternative recourse, made particularly perilous in the context of the first degree murder charge with a possible death penalty, the decision of the accused, on advice of counsel, to plead guilty to second degree murder might well be held to have been involuntary. The petitioner cannot be deemed to have waived his coerced confession claim by deliberately by-passing state procedures when the state failed to afford a constitutionally acceptable means of presenting that claim, and he cannot be deemed to have entered a voluntary plea of guilty if the plea was substantially motivated by a coerced confession the validity of which he was unable, for all practical purposes, to contest.

The judgment is reversed and the case remanded with instructions to hear and determine petitioner's application unless a hearing is held by the courts of the state determining under the standards set forth herein the issue of the voluntariness of petitioner's plea[4] within 60 days from the

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[4] The conviction would stand, of course, if the state court found after full and fair evidentiary hearing, either that the confession was voluntary or that the plea was not substantially motivated by the confession.

date of issuance of the mandate herein, or such further time as the District Court may for good cause allow.

Turning to *United States ex rel. Dash* v. *Follette,* Foster Dash was sentenced on August 3, 1959, in the New York state courts on plea of guilty to a charge of robbery second degree, to imprisonment for a term of 8 to 12 years as a second felony offender. Dash sought release by writ of error *coram nobis* on the ground that a false confession was obtained from him after indictment in violation of his right to counsel, and that his plea of guilty was induced by advice of counsel that the confession would negate any chance of acquittal and by a threat by the trial judge that he would receive the maximum possible sentence if he went to trial and was found guilty. The writs were denied without hearing, and the orders affirmed by the Appellate Division (21 A. D. 978) and by the Court of Appeals (16 N. Y. 2d 493, 260 N. Y. S. 2d 437 (1965)), two justices dissenting.

Petitioner then applied for writ of habeas corpus, alleging similar grounds, in the United States District Court for the Southern District of New York. The Court, John M. Cannella, *J.*, denied the application, relying principally on *United States ex rel. Glenn* v. *McMann, supra, United States ex rel. Swanson* v. *Reincke, supra,* and *United States ex rel. Boucher* v. *Reincke, supra,*[5] and petitioner appeals. We reverse and remand with instructions.

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[5] The District Court summarized the record before it as follows:

"Petitioner alleges: (1) that his plea of guilty was the product of a coerced confession, (2) that his plea of guilty was coerced by the trial court by telling him he would get the maximum penalty if found guilty after trial.

"In regard to the first contention, it is well settled that a voluntary plea of guilty entered on advice of counsel constitutes a waiver of all nonjurisdictional defects in any prior stage of

(*footnote continued on following page*)

Appendix B

In this case, as in *United States ex rel. Ross* v. *McMann,* decided herewith, a state prisoner's application for writ of habeas corpus was denied without hearing, the court relying largely on *United States ex rel. Glenn* v. *McMann,* since the petitioner, represented by counsel, had pleaded guilty in the state court. Here Dash alleges coercion of his confession. (Conviction of two of his co-defendants who went to trial was set aside because it was held that their confessions were coerced. *People* v. *Waterman,* 12 A. D. 2d 84, aff'd 9 N. Y. 2d 561 (1961).) He also alleges coercion of his plea, relying partly on the existence and threatened use of his coerced confession, and partly on an alleged threat by the judge to impose the maximum possible sentence if he were found guilty after a trial. The latter ground was dismissed from consideration by the judge because the report of the state court proceeding, *People* v. *Dash,* 16 N. Y. 2d 493 (1965), indicated that the prosecutor had filed an affidavit categorically denying that the trial judge ever threatened the defendant.

In this case, as in *Ross* v. *McMann,* the claim is made that the existence of a coerced confession, in a case determined prior to *Jackson* v. *Denno, supra,* so tainted the

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the proceedings against the defendant. *United States ex rel. Glenn* v. *McMann,* 349 F. 2d 1018 (2d Cir. 1965); *United States ex rel. Swanson* v. *Reincke,* 344 F. 2d 260 (2d Cir. 1965); *United States ex rel. Boucher* v. *Reincke,* 341 F. 2d 977 (2d Cir. 1965). Petitioner therefore cannot succeed on the basis of his first contention.

"With respect to the second contention it appears that the prosecutor in the state court proceedings filed an affidavit in which he categorically stated that the trial judge never threatened the defendant. See, *People* v. *Dash,* 16 N. Y. 2d 493 (1965).

"Further the transcript relating to the entry of petitioner's plea of guilty clearly indicates that the defendant made an intelligent and uncoerced choice and that no promises or threats were made to him."

state court proceedings that the plea was not voluntary. For the reasons set forth in *Ross* v. *McMann*, we think the allegations here sufficient to call for a hearing on the voluntariness of the plea unless a full hearing and determination of the issue is provided in the courts of the state. As we held in *Ross*, "The petitioner cannot be deemed to have waived his coerced confession claim by deliberately by-passing state procedures when the state failed to afford a constitutionally acceptable means of presenting that claim, and he cannot be deemed to have entered a voluntary plea of guilty if the plea was substantially motivated by a coerced confession the validity of which he was unable, for all practical purposes, to contest." In these circumstances there is an issue as to the motivation of the plea which cannot be resolved without a hearing. If it was motivated by the claimed threat of the judge, or the existence and threatened use of a coerced confession, it may be found not to have been voluntary. On the other hand, if it is found that there was no such threat by the judge, and if the plea was freely made on advice of counsel because of the weight of the state's case aside from the confession, with apparent likelihood of conviction regardless of the confession, in a considered effort to obtain a lighter sentence, the court may find the plea voluntary, and the conviction unassailable.

Reversed and remanded with instructions to hear and determine petitioner's application unless a hearing is held by the courts of the state determining under the standards set forth herein the issue of the voluntariness of petitioner's plea[6] within 60 days from the date of issuance of the

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[6] The conviction would stand, of course, if the state court found after full and fair evidentiary hearing, either that the confession was voluntary and there was no threat by the judge, or that the plea was not substantially motivated by the confession or by the alleged threat of the judge.

mandate herein, or such further time as the District Court may for good cause allow.

WATERMAN, *Circuit Judge,* concurring:

I concur in the opinion for the majority of the *in banc* Court written by Judge Smith.

I accept Judge Kaufman's approach in his concurring opinion, and I concur in that opinion, also.

SRW

KAUFMAN, *Circuit Judge,* concurring (with whom Judges Waterman, Anderson and Feinberg concur):

I am in full accord with my brother Smith's opinion.

Because we are not writing on a clean slate, and the majority accordingly came to the only conclusion open to it in *Ross* and *Dash,* I feel impelled to respond to the objections raised by my dissenting brothers.

Notwithstanding the caustic tones in which one of them has retorted I believe it my responsibility to set forth my views lest one believe that only the dissenters seek to protect us "against those who have made it impossible to live today in society" *Harrison* v. *United States,* 392 U. S. 219, 235 (1968) and that the majority has become an ally of criminals, devoid of all interest in the community's safety and living insensitively in its ivory tower.

First, I should hardly have thought it necessary, but for my brothers' dissent, even to mention the judicial precept that the ultimate guilt or innocence of the defendants has no bearing on the issues before us. Under our system of criminal justice two indispensable conditions must be met to render valid a determination of guilt: not only must the accused actually be guilty of the crime for which he was convicted, but the procedure leading to his conviction

must comport with the requirements of due process. Thus, even if we were to agree with my dissenting brother's declamation that "Men who first confess and then, on the advice of counsel, plead guilty to serious crimes, do so because they are," I submit that such an observation is gratuitous and irrelevant to the issue before us: whether the state procedures leading to the entry of the pleas of guilty in question were fundamentally fair in a constitutional sense.

Second, I am impelled to dissipate the impression that our decision is somehow a novel departure from established constitutional tenets. On the contrary our decisions here are absolutely required by the principles the Supreme Court has long enunciated. Thus, in *Machibroda* v. *United States,* 368 U. S. 487, 493 (1962), the Court cautioned:

> ". . . A plea of guilty differs in purpose and effect from a mere admission or extra-judicial confession; it is itself a conviction. Like a verdict of a jury it is conclusive. More is not required; the court has nothing to do but give judgment and sentence. Out of just consideration for persons accused of crime courts should be careful that a plea of guilty shall not be accepted unless made voluntarily after proper advice and with full understanding of the consequences." [quoting *Kercheval* v. *United States,* 274 U. S. 220, 223 (1927)].

This instruction of the Court cannot be ignored merely because the particular facts of that case are somewhat different from those in the cases before us, or because non-essential distinctions might be spun. If we could turn our backs on a pronouncement as clear as that quoted merely because the facts in the case under consideration may not be on all fours, no precept or *ratio decidendi* of the Su-

preme Court would have any force. It does not require too much imagination to recognize that the principles and the problems we are dealing with are the same. *Machibroda* mandated that, because of the extreme gravity of a guilty plea, in *all* cases where a conviction based upon such a plea is attacked we must *carefully* and conscientiously consider the surrounding circumstances to determine whether it was properly and voluntarily made. And since *Machibroda* itself involved a collateral attack on a conviction based upon a guilty plea we cannot, as one of my dissenting brothers suggests, ignore the applicability of this mandate to other cases where post conviction attacks are made on the propriety of the guilty pleas merely because they come "long after the defendant has gotten the benefit of his bargain."

Moreover, in *Herman* v. *Claudy*, 350 U. S. 116, 118 (1956), the Court further instructed:

> "... [A] conviction following trial *or on a plea of guilty* based on a confession extorted by violence or by mental coercion is invalid under the Federal Due Process Clause." [Italics added.]

While the petitioner in *Herman* alleged a more aggravated deprivation of rights than appears in the cases before us, such a distinction is not compelling. Although the court was dealing with a greater degree of contamination, I do not read *Herman* as preaching a doctrine that the taint must reach only the gradations found there before one may claim the pleas were induced by fundamentally unfair procedures. If the Supreme Court had intended to limit the holding to the precise facts in that case it would have done so explicitly, or at least by intimation, a course it has followed in so many other cases where it desired to achieve such a limited goal. When instead the court enunciated a clear, unqualified, and unequivocal principle of general ap-

plicability, we, as an inferior court, are duty bound to regard it as governing in analcgous cases presenting the same question of law. My brother Friendly made the point when he said in another context, "Our duty as an inferior federal court is to apply, as best we can, the standards the Supreme Court has decreed. . . ." *United States* v. *Motion Picture Film Entitled "I Am Curious–Yellow,"* Dkt. No. 32448 (2d Cir. decided November 26, 1968) (concurring opinion) at 3682 (holding the film not obscene), whether or not we would make the same pronouncements if free to do so.

Judges must be careful lest their personal predilections lead them to ignore the constitutional requirements set forth by the Supreme Court, by indulging in sophistic games of distinction-making because they do not approve of the Court's Constitutional determinations. In this instance we are buttressed in our interpretation of *Herman*, which one of my dissenting brothers pansophically dismisses as "a dismal failure," by the knowledge that many other federal circuit courts have also "failed" and read *Herman* precisely as we have. E.g., *Reed* v. *Henderson*, 385 F. 2d 995, 996 (6th Cir. 1967); *Smiley* v. *Wilson*, 378 F. 2d 144, 148 (9th Cir. 1967); *Bell* v. *Alabama*, 367 F. 2d 243, 246 (5th Cir. 1966), cert. denied 386 U. S. 916; *Jones* v. *Cunningham*, 297 F. 2d 851, 855 (4th Cir. 1962), cert. denied 375 U. S. 832 (1963). Indeed, in *United States ex rel. Vaughn* v. *LaVallee*, 318 F. 2d 499 (2d Cir. 1963), apparently overlooked, my able brother Lumbard endorsed *Herman* when, citing that case he remarked "A plea of guilty which is prompted by fear that unconstitutionally obtained evidence will be used at trial will not sustain a conviction." 318 F. 2d at 499.

Not only is the result of the majority following the only course left open to a lower court by the Supreme Court, but it is sound because, as the law must, it comports with

the realities of the situation. Consider for a moment the paradigm, where the prosecution has no other evidence against the defendant but the confession which it illegally obtained from him, and where, as in *Ross* and *Dash*, the defendant has no adequate means of challenging the confession prior to his trial. Under these circumstances it would be nothing less than fantasy for us to say that the existence of the confession could not have substantially motivated the plea. And if, in the more common case, the determination is more difficult because the prosecution also has other evidence against the defendant, I do not believe that such difficulty releases us from the obligation to consider the possibility that the existence of the confession had a substantial motivational effect. In reality we can never, as my brothers urge, escape deciding these cases, as distasteful as it might be. By refusing to consider them individually we merely decide they should all come out the same way—an approach hardly commendable or likely to reach a just result in those cases worthy of consideration.

Moreover, once we face up to the realities of the situation, the fundamental fallacy of my dissenting brothers' argument—that no coercion or untoward pressure of the *state* caused these pleas—becomes apparent. The state allegedly illegally obtained the confession from the defendant and the state denied him any adequate means of suppressing it prior to trial. How the state can then be transformed into a disassociated neutral observer when defendant pleads guilty because of that confession is too metaphysical for my comprehension. Once it has thus unfairly placed the defendant in an inherently coercive situation, I do not understand our solicitude for the state's claim that all pleas of guilty must under any and all circumstances be final, absolute and beyond judicial instruction.

Moreover, I must emphasize that, as the majority indicates in *Ross* we are by no means the first or only circuit to reach this result. Particularly in the Fourth Circuit, e.g., *White* v. *Papersack*, 352 F. 2d 470, 472 (1965); *Jones* v. *Cunningham, supra;* the Fifth Circuit, e.g., *Bell* v. *Alabama, supra;* and the Ninth Circuit, e.g., *Smiley* v. *Wilson, supra; Doran* v. *Wilson*, 369 F. 2d 505 (1966), the rule my dissenting brothers view as so novel and indeed unprecedented—that a guilty plea induced by the existence of an illegally obtained confession cannot stand —is well established law. And, we long ago embarked on the trying course of reviewing state convictions because the Supreme Court so decreed. See e.g., *U. S. ex rel. Caminito* v. *Murphy*, 222 F. 2d 698 (1955), cert. denied, 350 U. S. 896; *U. S. ex rel. Wade* v. *Jackson*, 256 F. 2d 7 (1958), cert. denied, 357 U. S. 908; *U. S. ex rel. Corbo* v. *LaVallee*, 270 F. 2d 513 (1959), cert. denied, 361 U. S. 950 (1960); where we found confessions coerced, despite jury findings to the contrary which had been accepted by New York Courts.

Finally, it would, in my view, be the rankest unfairness, and indeed a denigration of the rule of law, to recognize the infirmity of the pre-*Jackson* v. *Denno* procedure for challenging the legality of a confession in the case of prisoners who went to trial but to deny access to the judicial process to those who improperly pleaded guilty merely because the state would have more difficulty in affording a new trial to them. Nor do I believe that we are free to refuse to consider a valid claim for a hearing because the separation of meritorious claims from those of no merit is difficult. This "difficult" task is faced daily by judges; to avoid it by throwing out all petitions—even meritorious ones—because the chore is onerous would be an abdication of our judicial duty. The Supreme Court clearly stated in *Townsend* v. *Sain*, 372 U. S. 293 (1963) that where a state

prisoner alleges facts which, if proved, would entitle him to relief, he must be afforded a federal hearing on his habeas petition, where he has not received an adequate state hearing on the issue. And the Court has also held, repeatedly and emphatically, that where petitioner's allegations present an issue of fact not refuted by the files and records, we cannot deny him a hearing merely because his allegations are improbable. *Machibroda* v. *United States,* 368 U. S. 487, 494 (1962); *Waley* v. *Johnson,* 316 U. S. 102, 104 (1942); *Walker* v. *Johnson,* 312 U. S. 275, 285 (1941).

Although our decisions may encourage some prisoners to file petitions wholly devoid of merit, the short answer to this is that most advances in the law have been subject to abuse. But, if this were to deter courts from doing what should be done, the law would remain stagnant. Nor, do I share the belief that the mere filing of such petitions will overwhelm our experienced district judges. The trained judges' eyes can quickly sift out those not deserving of a hearing. It was not much of a task for the district judge and this Court to do just that with Rosen's petition. Indeed, the statistics of the Administrative Office of the Unied States Courts reflect that hearings in state habeas corpus cases between 1966 and 1968 have been granted in only about 8% of the approximately 5000 to 6000 applications filed each year during that period.[1] Moreover, we must not overlook the fact that pleas in the post-*Jackson* v. *Denno* era will not be affected by our ruling.

In any event, we have already recognized:

> "There is an understandable tendency to try to avoid hearings . . . where it appears that there is little merit

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[1] Administrative Office of the United States Courts, Annual Report of the Director, 1966 and 1967, Tables C-3 and C-4. The information for 1968 is not yet published.

> in the petition, and that hearing might well be of no avail to the petitioner. With the crowded dockets and delay caused by a heavy judicial workload, a diligent judge, out of concern for our goal of speedy justice, may well overlook the fact that a particular application alleges sufficient particulars to require a hearing. Our concern for efficiency must not outweigh our concern for individual rights. We cannot refuse a hearing because hearings generally show that there is no real basis for relief, or even because it is improbable that a prisoner can prove his claims." *United States* v. *Tribote*, 297 F. 2d 598, 603-04 (2d Cir. 1961).

A court of law whose function it is to guard against injustice cannot refuse access to those properly invoking its process merely because it must also deal with others who cry wolf too often.

Accordingly, I believe that when, as in *Ross* and *Dash*, a petitioner alleges facts sufficient to support his claim that his guilty plea was substantially induced by the existence of a confession illegally obtained from him which he had no adequate means of challenging, and his allegations are not controverted by the record, we cannot avoid our duty—time consuming as it may be—to grant him a hearing. Of course, we are not suggesting for a moment that the writ should be sustained after such hearing. The petitioner must carry the burden of establishing that the coerced confession substantially motivated him in pleading guilty. Thus, we are a long way from the house of horrors which the dissenting opinions suggest would confront us if a reprosecution were ordered. We do no more today than to determine that *all* petitions cannot be thrown out without regard to their merits merely because "no certain answers" can be given with the precision of a mathematical equation—a condition which the dissenters would seem to require. If this test had validity no court would ever inquire into the volun-

tariness of a plea of guilty or the voluntariness of a confession, for voluntariness is a purely subjective action and never can "certain answers" be given by the fact finder. One of my dissenting brothers recognizes that "Absent some credible and detached *proof* to the contrary, we must assume that defendant's interests have been protected, and that pleas of guilty would not have been offered without substantial basis for believing [they] were guilty . . ." (Emphasis added.) Ross and Dash merely ask for the chance to give this *proof* at a hearing, which I cannot find any sound basis for denying in light of the allegations in their petitions.

ANDERSON, *Circuit Judge* (concurring):

I concur in the opinions of Judge Smith and Judge Kaufman.

FEINBERG, *Circuit Judge* (concurring):

I concur in the opinions of Judge Smith and Judge Kaufman.

LUMBARD, *Chief Judge,* dissenting (with whom Judges Moore and Friendly concur):

I would affirm the denials by the district courts of the petitions of these two state prisoners, Wilbert Ross and Foster Dash, for writs of habeas corpus.

In my opinion, these cases are governed by *United States ex rel. Glenn* v. *McMann,* 344 F. 2d 1018 (2d Cir. 1965), which held that "a voluntary guilty plea entered on advice of counsel is a waiver of all non-jurisdictional defects in any prior stage of the proceedings." The conclusion that the guilty pleas in both of these cases were entered knowingly and without coercion is, to my mind, inescapable.

In each of these cases the state prisoner was represented by counsel long prior to the plea of guilty and there was adequate time for full consideration of the case by the defendant and his counsel. Furthermore, it is apparent that the pleas were motivated by knowledge that the state had substantial evidence in addition to any confession it may have had from the defendants. In sum, it is altogether clear that the defendants, after consulting with counsel, made an informed, deliberate and voluntary choice that their interests would be best served by pleading guilty to a lesser degree of the crime charged and by the likelihood that the sentence the judge would impose would be less than if they were to stand trial and be convicted.

Nor do I think that *Jackson* v. *Denno,* 378 U. S. 368 (1964), should be applied to require a hearing in plea of guilty cases to determine whether the existence of the allegedly involuntary confession "coerced" the plea of guilty or whether the plea was taken for other reasons. I would confine *Jackson* v. *Denno* to cases where New York used the confession at trial, over objection that it was coerced, at a time when New York failed to provide a means of testing such objection prior to trial; it should not be given retroactive effect to cases where defendants pleaded guilty.

To say that a hearing might show these pleas to have been "involuntary" because they were induced by the fact that New York law, at the time of the pleas, provided that the voluntariness of confessions which the petitioners claim they made would be tested by the jury, is to indulge in profitless speculation and to embark upon an inquiry where no certain answers are possible. Even the holding of hearings in such cases will impose upon New York's judicial system, and in corresponding degree on the Federal system, a substantial burden and needlessly consume the time of assigned counsel, law enforcement officers, prosecutors, those judges who accepted the pleas and those judges who must now take time to hold the hearings.

Appendix B

For many years these cases had been concluded and forgotten. How can it be supposed more than 13 years after Ross' plea of guilty to second degree murder that there can be any reliable reconstruction of what the prosecution and defense knew about the nature and weight of the evidence available in 1955, or about the facts relevant to the "confession" and the state of mind of Ross at the time he pleaded guilty? While Ross has had time in prison to store up memories and imagine what happened in May 1954, when the murder occurred, and in 1955, when he pleaded guilty, the state's files of the case have been stored away and must be found if they can be. The prosecutor will have little, if any, memory of the case apart from what the file may disclose, and Ross' counsel, if he be available, may no longer have any files or any memory about the matter whatsoever.

Slim as are the chances of any reliable reconstruction of the situation as it bears on the 1955 plea, even slimmer are the chances of again prosecuting the case should the judgment of conviction based upon the plea of guilty be set aside. The witnesses available in 1955 may no longer be available; and even if they are available they could hardly be expected to have any trustworthy memory of events in May 1954. Almost certainly, since there was no trial of the action,[1] none of the witnesses gave testimony in such form that it could be used now in the event that they cannot be located.

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[1] In this respect the state is usually at a serious disadvantage where pleas of guilty are nullified and the case must be tried years later. Where there has been a trial and a retrial is required, the state may use the evidence of a witness who has become unavailable. New York Code of Criminal Procedure § 8(3)(d). Where a defendant has pleaded guilty, however, it would be a very rare case where the witness would have testified under oath subject to cross-examination under such circumstances that the evidence could be used if the witness were later unavailable.

Of course, the petitioners will testify concerning their claims in the light of their present state of mind with their imaginations prodded and guided by recent court decisions, including the majority opinion here, which point out the facts which will support a petition.

Settling cases on pleas of guilty is the means whereby the state and the defendants concerned dispose of about 80% of all charges of serious crime and about 95% of all convictions of such crimes. Of course in all such cases defendants are represented by counsel and, almost without exception, this had been the practice in the State of New York for many years prior to *Gideon* v. *Wainwright*, 372 U. S. 335 (1963). It is a system which is advantageous to all the parties concerned; it saves an enormous amount of time for law enforcement officers and prosecutors; almost always it virtually guarantees the defendant a lesser penalty, usually on lesser and fewer charges,[2] it frequently makes possible the prosecution or disposition of charges against other persons; it enables the judges and courts to handle many times the volume of cases which could be processed were trial required in every case.

If a defendant's decision to plead guilty can be attacked and placed in jeopardy many years later, the state will have been deprived of a substantial part of the benefit which it properly and fairly thought it should enjoy—namely, achieving a sure and certain result and saving considerable time and expense. Once the court has accepted the plea and imposed sentence there is nothing which the state can do to reopen it. The charges which have been dismissed and disposed of are finally settled

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[2] The rationale for this has been articulated in the American Bar Association Standards for Pleas of Guilty, formulated by an Advisory Committee of which Walter V. Schaefer, Justice of the Supreme Court of Illinois, was Chairman and adopted by the ABA House of Delegates in February 1969.

forever. Absent any fraud or overreaching existing at the time of the plea, the same rule should apply with respect to the defendant's right to reopen the case. The people cannot benefit from any subsequent change in the law and the defendant should have no right to reopen the proceedings years later because some different procedure has been created by judicial decision.

The interest in finality is particularly important in this area because of the great percentage of convictions based upon pleas of guilty. As shown by the chart below, about 95% of all New York State indictments resulting in conviction are disposed of by pleas of guilty; in other words, for every conviction obtained after trial, 19 convictions are obtained by guilty pleas.

DISPOSITION OF INDICTMENTS IN NEW YORK STATE
(excluding youthful offender cases)[3]

Year ending June 30,	*Total dispositions*[4]	*Disposition by dismissal, discharge on own recognizance, and acquittal*	*Total convictions (after trial and by guilty plea)*	*Convictions by guilty plea*	*% of total dispositions based on guilty plea*	*% of total convictions based on guilty plea*
1963	18,711	3,288	15,423	14,655	95.0%	78.3%
1964	17,619	2,445	15,174	14,413	94.9%	81.8%
1965	16,421	2,188	14,233	13,501	94.8%	82.2%
1966	17,447	2,204	15,243	14,482	95.0%	83.0%
1967	18,029	2,701	15,328	14,461	94.3%	80.2%
Total 1963-1967	88,227	12,826	75,401	71,512	94.8%	81.0%

[3] From the annual reports of the Administrative Board of the Judicial Conference of the State of New York, for the years 1964

(*footnote continued on following page*)

Were there any reason to suppose that injustice has resulted from the taking of pleas of guilty in New York courts in cases where prisoners, represented by counsel, had confessed, further inquiry would at least be justified. But no such suggestion has been made; no cases of injustice are cited and so far as I am advised there have been no such cases. For many years New York State has provided counsel in all cases where serious crime is charged and the defendant is unable to retain counsel. Absent some credible and detailed proof to the contrary, we must assume that defendants have been properly advised by their counsel, that their interests have been protected, and that pleas of guilty would not have been offered without substantial basis for believing that the defendants were guilty in facts and guilty in law.[5]

For these reasons I find no justification in questioning these pleas of guilty in the light of the claims the petition-

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(*footnote continued from previous page*)

(pp. 236-239), 1965 (pp. 193-195), 1966 (pp. 269-271), 1967 (pp. 243-246), 1968 (pp. 333-335).

[4] The figures were arrived at by adding the figures from the Criminal Terms of the Supreme Court of New York City and the Supreme and County Courts outside New York City. The figures include all indictments disposed of:

(1) by plea of guilty to felony before, during or after trial,
(2) by plea of guilty to misdemeanor reduced from felony before, during, or after trial,
(3) by dismissal of the indictment,
(4) by discharge on own recognizance,
(5) by direction of acquittal,
(6) by acquittal after trial,
(7) by conviction after trial.

[5] Of course the gross incompetence of counsel *or* other circumstances indicating substantial failure of representation would present a different question under the Sixth Amendment. No claim of that sort is even suggested in these cases.

ers have made here. Nor do I find anything in any decision of the Supreme Court which requires a Federal court to hold a hearing on such claims. In *Machibroda* v. *United States,* 368 U. S. 487 (1962), the claim was that the court had not made proper inquiry regarding the voluntary nature of the plea as required by Rule 11, Federal Rules of Criminal Procedure, and also that the plea was entered because of promises and threats of the prosecutor. The court there held that despite affidavit denials by the prosecutor, the issues of fact required a hearing. No such compelling allegations are made by Ross or Dash.

Nor does *Jackson* v. *Denno,* 378 U. S. 386 (1964), require the district court to consider the confession claims. *Jackson* held that a defendant who had gone to trial, before a jury which was left to determine whether the confession admitted in evidence was voluntary, had been denied due process of law, since it was impossible to determine how the jury treated the confession. Here, however, the unconstitutionality of the pre-*Jackson* procedure is relevant only for its supposed impact in deterring defendants from going to trial and thereby inducing their pleas of guilty. This impact, which would be virtually impossible to determinte since it requires reconstructing the defendant's state of mind, is unquestionably remote and speculative. It cannot be doubted that the existence of the pre-*Jackson* procedure has had a far more remote effect on the reliability of the process for determining guilt, cf. *Johnson* v. *New Jersey,* 384 U. S. 719, 729 (1966), in plea of guilty situations than it has had in cases which actually went to trial.

Nor is it accurate to say that going to trial and contesting the voluntariness of their confessions was a useless procedure for defendants who claimed that their confessions had been coerced. Since 1955 this court has carefully examined records in New York State criminal trials where

such claims were made, and in some cases we have found that the confessions were coerced, despite jury findings to the contrary which had been accepted by the New York courts. See, e.g., *U. S. ex rel. Caminito* v. *Murphy*, 222 F. 2d 698 (1955), cert. den. 350 U. S. 896; *U. S. ex rel. Wade* v. *Jackson*, 256 F. 2d 7 (1958), cert. den., 357 U. S. 908; *U. S. ex rel. Corbo* v. *LaVallee*, 270 F. 2d 513 (1959), cert. den., 361 U. S. 950 (1960).

For these reasons, and because of the far greater effect it would have upon the administration of justice if it were applied to plea of guilty case, I think it is clear that *Jackson* v. *Denno* should be applied retroactively only to cases which went to trial. Cf. *Stovall* v. *Denno*, 388 U. S. 293 (1967).

There is no authority to the contrary. In the only case where this court has required a hearing involving a plea of guilty in a state court, *U. S. ex rel. McGrath* v. *LaVallee*, 319 F. 2d 308 (1963), the claim was that the trial judge had coerced the plea; there was no claim of a coerced confession.*

While I would affirm the denial of the prisoners' petitions for the reasons stated above, I also believe that even on principles stated in Judge Smith's opinion, it is clear that there is an insufficient basis to require a hearing. Therefore I proceed to discuss the facts of the two cases.

Petition for Wilbert Ross

On February 4, 1955, when Ross pleaded guilty to murder in the second degree, he knew that one Robert

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* Following this 1963 opinion there was an extensive hearing in the district court at which the state judge testified. The district court judge held that there had been no coercion by the state court judge and we affirmed the district court's denial of the petition for habeas corpus. 348 F. 2d 373.

Jenkins (whom he does not deny knowing) had told the police that Ross had forced him to commit the murder by threatening Jenkins' life and the life of Jenkins' wife. Ross knew this because, by means of an inter-office device, he heard Jenkins tell this to the police. At this time Ross was in jail on a charge of attempted grand larceny. Ross claims that following threats of the detectives, and after his request to consult his lawyer had been refused, he gave a statement which he signed after it had been reduced to writing. He was later questioned by an Assistant District Attorney and he signed a statement which consisted of questions and answers which had been stenographically recorded. He was not advised about an attorney and he did not ask to consult an attorney.

Ross advised the police where they could find the murder weapon and they did find it. Ross does not claim to be innocent of the murder; it is abundantly clear that he is not.

Had Ross stood trial and had he testified he would have had to admit to a criminal record—by his own petition he had by then been convicted of attempted grand larceny (whether after trial or on plea he does not state) for which he had meanwhile been sentenced to a term of two to three years in state prison.

Ross was represented by Harvey Strelzin, Esq., whose competence he does not question, and Strelzin, who knew of Jenkins and the gun, advised a plea of guilty to murder in the second degree. Ross does not offer Strelzin's affidavit in support of his position, nor does he account for his failure to submit any affidavit or statement from Strelzin.

The majority holds that a petitioner must show that the plea was "substantially motivated by the coerced confession" before he is entitled to relief. As illustrated by *Rosen*, which we also decide today, a petitioner is also

required to make a substantial showing that the plea was in fact the result of the coerced confession and not of some other factor before he is entitled to a hearing. Whether the petitioner had made a sufficient showing in any particular case can only be determined by looking at the specific allegations. Where, as here, it appears that there was substantial other evidence against the petitioner, that his counsel recommended that he not pursue the confession claim, that he pleaded to a reduced charge, and that he did not raise the claim for ten years, the petitioner should be required to make more of a showing than the bare boned allegations he has made here before any court should be required to grant a hearing. In my view, petitioner's unsupported allegations suggest a conclusion that his counsel told him not to bother trying to "get back" his confession and going to trial, since he would, even without the confession (or the gun, for that matter), stand a good chance of being convicted of first degree murder and being sentenced to death. Ross accepted this as good advice and accepted the plea as a good bargain. Far from showing that the plea was substantially motivated by the confession, the allegation show that it was motivated both by the knowledge of guilt and the fear of being convicted for the crime he actually committed. In these circumstances, the plea should stand and no hearing to question it should be required.

Petition for Foster Dash

The petition of Foster Dash seeks a hearing on two different grounds: (1) that the plea was involuntary because there was not available to him at the time of his plea in 1959 a constitutional means of testing the voluntariness of his confession; and (2) that the trial judge coerced him into pleading guilty by threatening him that

he would get the maximum sentence if he stood trial and was convicted. As to the first ground, I would deny relief for the reasons I have set forth above.

But, even applying the standards set forth in Judge Smith's opinion, I do not believe a hearing should be granted as Dash gives no reason why he has not supported his petition with an affidavit or statement of his counsel. In fact there is nothing in the record to show who counsel was. The petition is wholly insufficient in failing to supply many material details of which the petitioner must have knowledge.

From Dash's sketchy petition, the answering affidavit of an Assistant Attorney General which is not controverted by Dash as to any stated facts, and from the decisions of the New York courts concerning Dash and his three co-defendants the following emerges:

On February 9, 1959, four persons, one of whom was armed, held up and robbed one Shedletsky in Bronx County. On February 24, 1959, the Grand Jury indicted Joseph E. Fields, "John Doe," "Richard Roe" and "Peter Doe" for the crime. Fields was the only one who had been apprehended soon after the crime and it was he who shortly thereafter named as his three confederates the petitioner, Foster Dash, Albert Devine and Rudolph Waterman.[1]

Dash was arrested on February 25 or 26. His petition alleges the police took him to a station house in New York County where he was beaten but said nothing and thereafter to a station house in the Bronx. He requested to contact his family, or that he be permitted to have counsel, but he alleges these were denied him. He was further questioned and held incommunicado for 7½ hours

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[1] Apparently Waterman was not questioned until June, 1959, when he was in prison on another charge. The record does not show when Devine was arrested.

and then taken to the district attorney's office. He alleges threats made to him and the denial of his further requests. He says that he "then involuntarily signed a prefabricated confession to a crime that I did not commit."

Dash first mentions his "defense counsel" as being present on March 16, 1959 when he appeared for pleading and the district attorney "was only offering a plea to robbery in the first degree." He claims counsel advised him to plead guilty and throw himself on the mercy of the court because of the confession.

When the case came up again for pleading on April 1, 1959, Dash alleges the trial judge stated that if he went to trial and lost, the court would impose the maximum penalty and the judge said the crime with which he was charged was "next to murder."

Dash alleges that when the case was called again on April 6, he entered a plea of robbery in the second degree "due to the undue pressure which was placed upon this relator, as well as the alleged co-defendant." Later in his petition Dash states that "the threats made by the court was not a matter of open record." Fields also pleaded guilty that day. Later, on August 3, 1959, Dash was sentenced to a term of 8 to 12 years as a multiple offender. From Dash's petition it seems that prior to the plea he was already a second felony offender and if he pleaded guilty he faced a possible maximum sentence of 60 years. Fields was sentenced to 10 to 12 years.

Waterman and Devine stood trial and following their conviction for robbery first degree, grand larceny second degree and assault second degree, they received sentences of 15 to 20 years. The Appellate Division in *Peop.* v. *Waterman,* 12 A. D. 2d 84, reversed the convictions and the Court of Appeals affirmed on the ground that it was constitutional error to admit into evidence the post-indictment statement of Waterman taken in the absence of counsel, 9 N. Y. 2d 561 (1961). Waterman and Devine

later pleaded guilty to assault second degree and were sentenced to 2½ to 3 years.

Dash then brought *coram nobis* proceedings, seeking treatment similar to Waterman and Devine on the ground that his confession had induced his plea of guilty, and he also claimed his plea was coerced by the judge's threat. His petition was denied by all courts although in the Court of Appeals two judges voted to remand for a hearing as to whether the guilty plea was coerced. In its memorandum decision, 16 N. Y. 2d 493 (1965), the Court of Appeals, because *Jackson* v. *Denno, supra,* had but recently been decided, expressly approved its earlier holding in *People* v. *Nicholson,* 11 N. Y. 2d 1067 (1962), that it would not listen to post-conviction attacks on confessions where defendants had pleaded guilty. The court wrote:

> "A defendant who has knowingly and voluntarily pleaded guilty may not thereafter attack the judgment of conviction entered thereon by *coram nobis* or other post-conviction remedy on the ground that he had been coerced into making a confession and that the existence of such coerced confession induced him to enter the plea of guilty. If a defendant desires to contest the voluntariness of his confession, he must do so by pleading not guilty and then raising the point upon the trial; he may not plead guilty and then, years later, at a time when the prosecution is perhaps unable to prove its case, assert his alleged constitutional violation. The issue as to whether the confession was illegally obtained is waived by the guilty plea."

Thereafter Dash knocked on the federal court doors of the Sourthen District.

In my view, Dash, advised by counsel, made a deliberate and voluntary choice that his interests were best served by

his plea of guilty. He must have known that Fields had made a statement to the police which implicated him; he did not know what Waterman and Devine might do.

But the petitioner says nothing about what counsel advised him, what he and counsel knew and what evidence was available to the state. We are not even told the name of counsel and whether counsel was retained or assigned. We do not know whether the victim of the robbery, Shedletsky, could identify Dash; obviously he had identified Fields who was caught soon after the crime.

As to the second ground for a hearing, the alleged threats of the judge, the New York Court of Appeals has passed upon this and has held in effect that not enough is alleged to require a hearing. I agree. The allegation seems to amount to little more than that the judge pointed out to the defendant, as indeed he should have, what he faced in the event of conviction, whether by trial or plea. Obviously the record does not bear the petitioner out as he alleges that "the threats made by the court was not a matter of open record." If we had before us an affidavit of counsel or any other reliable witness to support Dash's claim of judicial coercion there might be sufficient reason to order a hearing as we did in *U. S. ex rel. McGrath* v. *LaVallee*, 319 F. 2d 308 (1963) where the court thought the minutes were ambiguous. But here there is insufficient substantiation and the district court properly denied a hearing.

For these reasons I would affirm the judgments of the district courts which denied the petitions of Ross and Dash for writs of habeas corpus.

The enforcement of their criminal laws by the states is an area where federal courts should act with some care and with due appreciation of the consequences. When the Supreme Court decided *Fay* v. *Noia*, 372 U. S. 391 (1963), where it held that federal habeas corpus is still available to a state prisoner even though he has failed to appeal his conviction, Mr. Justice Clark in his dissent pointed out

that the floodgates were being opened. The following year state prisoners filed 3,531 petitions in federal courts, an 80% increase over the 1,903 petitions the year before. The tide rises year by year:

Fiscal Year	*State Prisoner Habeas Corpus petitions filed in the Districts Courts*[8]
1963	1,903
1964	3,531
1965	4,664
1966	5,162
1967	5,948
1968	6,331

As a majority of my colleagues have now clearly charted for all state prisoners who are imprisoned after pleas of guilty what they must allege in order to get a hearing, it will follow as surely as night follows day that the federal courts will be inundated with petitions which will total many times the 6,331 commenced in 1968.

Everywhere in the United States local courts and prosecutors are today having to cope with a steadily mounting increase in criminal cases each one of which requires two or three times more court time than was the case a few

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[8] The District of Columbia, the Canal Zone, Guam and the Virgin Islands are excluded. See the Annual Report of the Director of the Administrative Office of the United States Courts (p. II-44, preliminary ed. 1968).

Of the total of 27,539 such petitions filed during the period from 1963-1968, 3,581, or 13%, were filed in the district courts of the Second Circuit. See the annual reports of the Director of the Administrative Office of the United States Courts for the years 1963 (p. 201), 1964 (p. 221), 1965 (p. 183), 1966 (p. 175), 1967 (p. 205), 1968 (table C-3, preliminary edition).

years ago. Counsel is usually assigned at the beginning of the case, at least as early as the arraignment. Thereafter preliminary hearings are held on search and seizure, the admissibility of confessions, identification and other evidence. Only after such hearings have been decided adversely to the defendant, are cases tried or pleas of guilty entered. Thereafter appeals are taken, and in New York these may be taken even after pleas of guilty. But this will not be the end because the federal courts, if the views of my colleagues in these cases should prevail, must now entertain petitions from state prisoners who pleaded guilty years ago and hold thousands of hearings.

With these decisions we accelerate unmistakably the trend toward federal court supervision and correction of every possible error or supposed error which can be made in the prosecution of a state criminal case. What plea of guilty cannot be alleged to have been "coerced" for some fanciful reason? What is there left which cannot be argued to be a violation of due process, or an unequal protection of the laws? How is the most competent and experienced attorney who is assigned to represent a defendant to protect himself against any charges of incompetence or failure fully to advise a defendant regarding a proper defense to the charges or a settlement by way of guilty plea?

I wish to be counted among those who do not think federal judges were ever meant to review every state criminal proceeding or that there is any basis for supposing that they can reach a more just result than the state court judges. We would be well advised not to arrogate so much ultimate power to ourselves, as has been done by federal decisions the past six years, in the name of safeguarding constitutional rights, and to be chary of exercising such power except in the most compelling circumstances. We have gone far enough already; we should not take the further step which will lead to the review, in one guise or another, of every plea entered in a state court.

Appendix B

I would affirm the district court orders which denied the petitions.

MOORE, *Circuit Judge* (dissenting) (with whom Chief Judge Lumbard and Judge Friendly concur):

I would not differ from Judge Smith's thoughtful and carefully analytical opinions in this and the companion case, *United States ex rel. Dash,* including the comment "when to hold a hearing has apparently been complicated in this Circuit," were it not for the fact that these decisions well illustrate the "complicated" nature of the problem, namely, hearings directed in *Ross* and *Dash* and no hearing in *Rosen.*

My doubts and disagreement stem from the majority's assumption that "This case raises the narrow question whether a District Court should apply the standards of *Townsend* v. *Sain,* 372 U. S. 293 (1963), in determining whether to hold an evidentiary hearing upon a habeas corpus petition where the petitioner is confined after a plea of guilty and is contending that the plea was not voluntary, because it was induced by the existence, or threatened use, of an allegedly coerced confession."

The belief of four members of the Court in *Townsend* v. *Sain, supra,* as to the ineffectiveness of the so-called "standards" in actual application is well expressed in the dissenting opinion of Mr. Justice Stewart at 325-334. Furthermore, I find nothing in *Townsend* v. *Sain* which indicates that "where the petitioner in such a case has not received a 'full and fair evidentiary hearing' in a state court as to the voluntariness of the plea, a hearing be held in the federal District Court."

Townsend was convicted of murder after trial by jury; the habeas corpus proceeding was based upon the illegal admission of a confession obtained while he was under the

influence of drugs. The Supreme Court was not dealing with a plea of guilty, the circumstances under which it was made or, as here, the quality of the evidence in the petition attacking the plea. Therefore, the so-called "standards" of the majority in *Townsend* v. *Sain* relating to the development of the factual circumstances surrounding an illegal confession cannot be expected to be the standards which that Court would have set were it dealing with a situation in which a petitioner sought to repudiate a guilty plea.

Referring to the specific cases now under consideration: In *Ross,* the trial court had all the essential facts before it to render an objective decision, yet this court directs a hearing. In *Rosen,* in addition to allegations of the existence and threatened use of a coerced confession, there was proof that Rosen's wallet (comparable to the gun evidence in *Ross*) was found at the scene of the burglary and that he "was represented at trial by [experienced] counsel whose competence he does not attack." Accordingly, this court finds that "the application was insufficient" to justify a hearing. In *Dash,* there was also the existence and threatened use of an allegedly coerced confession and a State-court-rejected claim of a threat by the trial judge to impose a maximum sentence if Dash were found to be guilty. This court holds that "In these circumstances there is an issue as to the motivation of the plea which cannot be resolved without a hearing."

If "motivation" is to be the test, of necessity there must be a hearing in all cases so that the prisoners' mental processes may be reviewed and appraised in the light of their present reflections over their now-much-regretted decisions to plead guilty. If our decision to consider *en banc* these three cases has been for the purpose of affording some "standards" for district court judges in their determinations as to when to hold a hearing, our deliberations and the results thereof have been an exercise in futility. The conclusion is obvious that appellate judges have chosen

to read the petitions differently in the three cases and that the strongest factual case for denial of a hearing, *Ross,* leads the group in reversal of the district court's appraisal of the merits of the application.

The answer is not to be found in generalities in the many cases in which hearings had actually been held in the district court. In this group are: *United States ex rel. Swanson* v. *Reincke,* 344 F. 2d 260 (2d Cir. 1965), *cert. denied* 382 U. S. 869; *Hall* v. *United States,* 259 F. 2d 430 (8th Cir. 1958), *cert. denied* 359 U. S. 947; *Watts* v. *United States,* 278 F. 2d 247 (D. C. Cir. 1960); *United States ex rel. Staples* v. *Pate,* 332 F. 2d 531 (7th Cir. 1964); *United States ex rel. Boucher* v. *Reincke,* 341 F. 2d 977 (2d Cir. 1965); and *United States ex rel. Siebold* v. *Reincke,* 362 F. 2d 592 (2d Cir. 1966).

None of these cases bear upon the issue "when to hold a hearing." This question must, and can, be determined only from the papers before the district judge. This truism, often overlooked or ignored, was succinctly stated in *United States* v. *Ellenbogen* (Anderson, *C. J.;* Lumbard, *Ch. J.* and Waterman, *C. J.* concurring), 365 F. 2d 982 (1966), as follows:

> "The trial court's exercise of discretion can only be tested in the light of the reasons disclosed at the time the motion was heard and not on the basis of more elaborate representations argued on appeal. *Ungar* v. *Sarafite, supra,* at 589, 84 S. Ct. 841."

Accepting the premise that the district judge has before him only the petition and possible supporting affidavits and the statement in *Glenn* that "a voluntary guilty plea entered upon advice of counsel is a waiver . . .," in my opinion inquiry should focus upon "voluntary" and "advice of counsel." In other words, has the petitioner met his burden of showing, in a factual and not a conclusory man-

ner, that pressures, deceptions or possibly mistakes of material facts of constitutional magnitude were the inducing cause of his guilty plea—the elements crucial to a decision by the district judge as to when to hold a hearing? To decide this question, the district judge must attempt to make an objective evaluation of an essentially subjective decision by the prisoner, to wit, what induced him to plead guilty? Sufficient factual allegations should be presented so that as accurate a reconstruction of the "guilty plea" scene may be made as possible. First, consider the confession. It was definitely made when Ross was "in custody." The custody, however, was not while under suspicion of the murder but rather in Sing Sing Prison where he was serving a sentence for attempted grand larceny. Second, at the time of his plea, Ross was represented by competent counsel. Third, Ross knew that a co-defendant, Jenkins, had confessed and would testify against him. Fourth, Ross knew where the gun, the murder weapon, was. Fifth, Ross' attorney knew of Ross' claim and professed desire to repudiate the confession. Against the background of these facts, Ross pleaded guilty. There is no showing that Ross did not understand their effect on a possible conviction of first-degree murder or that he did not have a full opportunity to discuss all the facts with his attorney and weigh their consequences. Ross has produced no facts indicating incompetence of counsel or inadequacy of access to him.

Upon all the facts, I conclude that the district judge properly exercised his discretion in denying the petition without directing a hearing. Ross, in my opinion, has failed to meet his burden of showing that his plea was involuntary. In a way, every plea is "involuntary" because the defendant is forced—even coerced—by the situation then facing him to make a decision and to choose between the two evils which then confront him. If he chooses the lesser of the two evils, he is scarcely making a "voluntary" (in a Websterian sense) decision. Probably the test

should be an "understanding" decision to be determined as objectively as possible—therefore, the importance of the factual allegations. To be sure, Ross' choice obviously was not easy or pleasant. He alone had to make that choice in the light of his own secret knowledge of his guilt or innocence, the not so secret knowledge of the gun and Jenkins' proof, and aided by the practical and objective advice of counsel.

I do not differ with the majority's statement that "The question to be answered in any case involving a collateral attack on a conviction based on a plea of guilty is usually expressed in terms of whether or not the plea was a 'voluntary' act."—but this is not the question now before us. Nor are we faced with the hypothesis suggested by them, that we would be holding that a coerced confession may never be raised as a factor rendering a plea involuntary. I would not so hold and do not find that our own cases reach this result.

Affirmatively, I would hold that an appellate court should not follow the line of least resistance, namely, to grant a hearing in every case and, thus, by their decisions deter district judges from deciding cases without a hearing where no substantial showing has been made by petitioners that their pleas of guilty were involuntary. This leads me to the conclusion that we should adhere to our supposed appellate function and pass upon the district judge's judgment and not consider the case *de novo*. Using this standard, I find that upon the facts before him in this case, he properly denied the petition without a hearing.

I am not unmindful of the decision in *United States ex rel. Richardson* v. *McMann* (also decided this day). That case presents an unusual exception to the principle that a district judge can pass only upon the papers before him. There we took into consideration the allegations placed before us in an affidavit presented for the first time in the

appellate brief which raised, in effect, the question of inadequate representation of counsel. Whether these charges are frivolous and possibly perjurious or are based upon fact could not have been determined on the papers before us. Under these special and exceptional circumstances, we felt that the interests of justice required a hearing at which all parties vitally interested in establishing the true situation could be heard.

The *Richardson* case is not in my opinion in any way controlling on the problem here, and I would affirm the district judge's decision.

FRIENDLY, *Circuit Judge* (dissenting) (with whom Chief Judge Lumbard and Judge Moore concur):

No decision of the Supreme Court has held or even intimated that an accused who has been convicted upon a guilty plea, made on the advice of counsel after full explanation of its consequences and without coercion or trickery of any sort by the state, and thus "voluntary" in the ordinary use of language, is entitled to have the conviction set aside because the plea was influenced in greater or less degree by a previous act of the state in violation of his constitutional rights.

The two decisions relied on in the majority opinion are *Machibroda* v. *United States,* 368 U. S. 487 (1962), and *Harrison* v. *United States,* 392 U. S. 219, 223 (1968). *Machibroda* was the archetype of a claim of an involuntary plea in the time-honored sense; the defendant alleged this had been made on the faith of a promise by an Assistant United States Attorney that was not performed. While the Court's statement, quoting *Kercheval* v. *United States,* 274 U. S. 220, 223, that guilty pleas should not be accepted "unless made voluntarily after proper advice and with full

understanding of the consequences" is indeed clear, as a concurring opinion here states, what is equally clear is that the Court was not speaking at all to the issue whether a plea so made can nevertheless be set aside, long after the defendant has gotten the benefit of his bargain and when the state has lost its ability to prosecute, because of previous allegedly impermissible conduct by the state. The quotation followed the hardly novel affirmation that "A guilty plea, if induced by promises or threats which deprive it of the character of a voluntary act, is void." The sole issue in the case was whether Machibroda had alleged enough to have a hearing. The Justices who decided he had could scarcely have believed they were settling the altogether different and highly important issue we have before us here. The decision by a sharply divided Court in *Harrison* dealt with still another problem, of rather small practical dimensions, the use of testimony at a previous trial that was claimed to have been induced by a previous illegally obtained confession.

The effort of the concurring opinion to fill the void with an extract from *Herman* v. *Claudy*, 350 U. S. 116, 118 (1956), is a dismal failure. It is true that Mr. Justice Black there stated, to give the quotation in full, "Our prior decisions have established that: (1) a conviction following trial or on a plea of guilty based on a confession extorted by violence or mental coercion is invalid under the Federal Due Process Clause." However, none of the six decisions cited in support of that statement related to guilty pleas. The *Herman* case did concern such a plea but the opinion must be read in the context of petitioner's allegations, 350 U. S. at 119, that:

> "The assistant prosecuting attorney demanded that petitioner sign a plea of guilty to all the charges. When petitioner asked what he was signing, the assistant

> prosecuting attorney said 'Sign your name and forget it.' Petitioner was not informed of the seriousness of the charges by the prosecutor or the judge; he did not know that his plea of guilty could result in a maximum sentence of some 315 years; he did not know nor was he informed that he could have counsel. Petitioner pleaded guilty to all of the charges against him. He says now he was innocent of all but one."

No cumulation of resounding adjectives can conceal the chasm separating *Herman* v. *Claudy* from the case before us. If any such facts had been presented here, there would have been no *in banc* and no dissents. To regard a phrase in the *Herman* opinion as compelling decision without regard to the totally different facts that gave rise to it is to ignore rather than to follow the genius of the common law system.[1]

Our own previous opinions point away from the determination now made rather than toward it. While the court sitting *in banc* is free to engage in a new departure, I perceive no sufficient reason for embarking on an uncharted course that will impose a tremendous burden on state and federal judges, prosecutors and lawyers furnishing assistance to the indigent and, to the small extent it has any practical effect, will further impair the ability of society to protect itself "against those who have made it impossible to live today in safety." *Harrison* v. *United States, supra,* 392 U. S. at 235 (dissenting opinion of White, *J.*, see also dissenting opinions of Black, *J.* and Harlan, *J.*).

The court's opinion supplies no intelligible guidelines to

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[1] The same comment applies to the reference to a characterization of *Herman* in *United States ex rel. Vaughn* v. *LaVallee,* 318 F. 2d 499 (2 Cir. 1963), where this court approved denial of habeas corpus to a petiitoner who alleged that his guilty plea was induced by an illegal search.

help lower courts in handling the Herculean task it assigns them. A hearing must be had whenever a prisoner makes "particularized allegations as to how that confession rendered his plea involuntary." This test will speedily become well known in the prisons and is exceedingly easy to meet; the error made by the relator in *United States ex rel. Rosen* v. *Follette*, decided herewith, will not be repeated. The court gives almost no aid concerning the standard for ruling on petitions after a hearing has been held. Is it enough that the illegal confession was *a* factor or must it have been an *important* factor? And how can anyone tell? Isn't a confession almost inevitably an important factor except when the other evidence is overwhelming? Even if the standard were framed a bit more rigidly so as to require a showing that the plea would not have been made "but for" the confession, the trial courts are being given a job impossible of successful performance. Despite superficial similarity, this issue is actually quite different from determining whether a plea of guilty was "voluntary" in the traditional sense. To decide that issue the court need only determine whether unfair pressures were applied; if they were, *non constat* that the defendant would have pleaded guilty without them. For the same reason the question is also less susceptible of satisfactory answer than deciding whether a confession was "voluntary"; yet lack of confidence in the ability of judges to handle that issue underlay the prescription of specific rules on police interrogation in *Miranda* v. *Arizona*, 384 U. S. 436 (1966). Even in what would seem the strongest case for the prisoner, namely, where a confession illegally obtained when other evidence was then lacking has been speedily followed by a guilty plea, how can anyone ever know whether the accused would not have made the same decision anyway, because of his knowledge of the availability of additional evidence and the consequent attractiveness of a lower sentence? The only cases concerning which there can be reasonable cer-

tainty are those at the opposite end of the spectrum, where there was so much untainted evidence that the confession could not have been a significantly motivating factor. If the "but-for" test is the right one, the instances where a court will be required to set aside a guilty plea will thus be a small fraction of the fraction in which a confession was illegally obtained; in an even smaller fraction of these would the defendant have escaped conviction; and the fraction in which he was innocent will, of course, be infinitesimal. If ever a situation called for heeding Mr. Justice Jackson's admonition against seeking needles in haystacks, *Brown* v. *Allen*, 344 U. S. 443, 536-39 (1953) (concurring opinion), and enabling courts and lawyers to devote their limited time to worthier causes, this is it.

On the other hand, any standard less severe than the "but-for" test would be grossly unfair to the state, and even this is unfair enough. In contrast to the situation where the legality of a confession has been tested before or in the course of a trial, the prosecutor will generally have dismantled whatever material he had. If the constitutional claim succeeds, the state will rarely be able to conduct the trial that is all the defendant deserves on any view, even though sufficient untainted evidence was available when he pleaded guilty years before. Here, if Ross had elected to stand trial for murder fourteen years ago, Jenkins would have been an important witness against him; we are not told whether Jenkins is still available but, even if he is, his evidence concerning events of 1954 will not be very convincing. The way to protect both the accused and society with respect to this problem, is through statutes like §§ 813-c and 813-g of the New York Code of Criminal Procedure which allow the defendant to move in advance of plea to suppress the fruits of an unconstitutional search or an illegally obtained confession and, if the motion is denied, to plead guilty and nevertheless appeal; a record

is thus made and, if the accused prevails, he can be tried before too much time has elpased since the crime. With these statutes taking care of the future, I would leave the past where these prisoners were content to have it.

I recognize that the court apparently limits itself for the time being, to New York confessions antedating *Jackson* v. *Denno,* 378 U. S. 368 (1964), and postpones the problems with respect to later New York confessions, those in Connecticut and Vermont, and illegal searches and seizures. I realize also that a special argument can be formulated concerning these pre-*Jackson* confessions on the basis that the accused had no constitutionally acceptable way to test their legality. But the pejorative overtones of such a statement considerably outrun the fact. While the procedure prescribed by *Jackson* is a substantial improvement, the previous New York practice was a long way from denying an accused a reasonable opportunity to have the validity of his confession determined. The majority in *Jackson* conceded that New York's belief in the fairness of its procedure was "not without support in the decisions of this Court," 378 U. S. at 395, notably *Stein* v. *New York,* 346 U. S. 156 (1953), and four Justices found nothing constitutionally wrong with it. Furthermore there was always the opportunity to resort to federal habeas corpus in the event of conviction and to have the voluntary nature of the confession tested there. The case where a defendant otherwise willing to stand trial was forced into a guilty plea by the difference between pre-*Jackson* and post-*Jackson* procedures with respect to confessions, is thus a construct of the fertile brains of defense lawyers without counterpart in reality.

The rhetoric in the concurring opinion is badly misplaced. The issue is not whether Ross and others like him should be denied rights accorded them under the due process clause, which all would agree they should not, but whether,

after having made a bargain recommended by competent counsel with full knowledge of the facts and the consequences, they should now be permitted to repudiate it on grounds whose availability was then well known to them, at a time when the state is unable effectively to controvert either their claims of illegality or prove their guilt. Any morality in this position altogether eludes me. It is high time to recall that, even with respect to criminal defendants, a bargain is a bargain if made by an intelligent man with full protection from the court and on the advice of counsel. The thousands of tedious journeys which we here inflict on state and federal judges cannot be justified by any real prospect that a few innocent defendants may be found at the end of the tunnel. Men who first confess and then, on the advice of counsel, plead guilty to serious crimes, do so because they are.

For these reasons, as well as those given by my brothers Lumbard and Moore, in whose opinions I join, I decline to participate in opening up a large new area where New York criminal convictions have been thought until this time to possess finality.

Appendix B

Circuit Court Opinions—Richardson.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 371—September Term, 1967.

(Argued April 1, 1968 Decided February 26, 1969.)

Docket No. 31402

UNITED STATES *ex rel.* WILLIE RICHARDSON,

Appellant,

—against—

DANIEL MCMANN, Warden, Clinton Prison, Dannemora, Nek York,

Appellee.

Before:

MOORE, WOODBURY* and SMITH,

Circuit Judges.

Appeal from an order of the United States District Court for the Southern District of New York, Stephen W. Brennan, *Judge,* denying appellant's petition for a writ of *habeas corpus,* application for reargument, and application for a certificate of probable cause.

Reversed and remanded for a hearing.

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* Of the First Circuit, sitting by designation.

JOHN T. BAKER, New York, N. Y., *for appellant.*

LILLIAN Z. COHEN, Assistant Attorney General, New York, N. Y. (Louis J. Lefkowitz, Attorney General of the State of New York, New York, N. Y.; Samuel A. Hirshowitz, First Assistant Attorney General, New York, N. Y., of counsel), *for appellee.*

MOORE, *Circuit Judge*:

This is an appeal from an order denying appellant's* petition for a writ of habeas corpus, for reargument and for a certificate of probable cause without an evidentiary hearing to determine the voluntariness of appellant's plea of guilty of second degree murder in the Supreme Court, New York County (28 U. S. C. § 2253).

On March 24, 1963, two of appellant's relatives were found murdered in their apartment and on the same day appellant was taken into custody. He told police that he had been in his relatives' apartment at the time an altercation between them began and claimed that he had attempted to break it up and, in so doing, got blood on his clothes. He was later booked for homicide and shortly thereafter, signed a confession. On April 20th, appellant was indicted in New York County, New York, for murder in the first degree and two attorneys were assigned to represent him. On that date he pleaded not guilty. On July 22nd, appellant withdrew his plea of not guilty to first degree murder and entered a plea of guilty to murder in the second degree under the first count of the indictment to cover both counts of the two-count indictment. He was convicted on that plea and was sentenced on October 9, 1963, to a term of 30 years to life.

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* Appellant refers to relator, Willie Richardson.

Appendix B

A subsequent motion to suppress the confession was treated as an application for a writ of error *coram nobis* and was denied without a hearing on July 27, 1964, by the Supreme Court, New York County. The Appellate Division affirmed without opinion. *People* v. *Richardson,* 23 A. D. 2d 969 (1st Dep't 1965). Leave to appeal to the New York Court of Appeals was denied on June 8, 1965. State court remedies have been exhausted.

Appellant presented a petition to the district court in which he alleged in substance that his plea of guilty to a reduced charge in the State court was invalid because it was induced by the existence or threatened use of an allegedly coerced confession.

Accompanying his brief to this Court, appellant has annexed an affidavit entitled "SUPPLEMENTAL AFFIDAVIT IN SUPPORT OF PETITION FOR WRIT OF HABEAS CORPUS" and claims that because he was without counsel when he filed his petition he "failed to include several facts" relevant to his petition and to his appeal. This affidavit was not before the district court which had no opportunity to consider it or the "facts" therein set forth. Despite the fact that this supplemental affidavit is not a part of the district court record, it is received so that the matters therein alleged may be thoroughly investigated and, if possible, the truth ascertained.

Appellant states in this affidavit that after indictment for first degree murder (1) Alfred Rosner, Esq., was assigned to represent him; (2) that Mr. Rosner came to see him the last week of June or the first week of July 1963; (3) that his entire visit "lasted approximately 10 minutes"; (4) that although Mr. Rosner asked what happened, he "did not take any notes"; (5) that "He [Mr. Rosner] told me [appellant] that he would get paid the same amount of money for representing me [appellant] regardless of the outcome"; (6) that "He [Mr. Rosner] did not mention

what he intended to do to help me [appellant] or prepare my case"; (7) that the next time (July 22, 1963) he saw Mr. Rosner after the first visit in jail was when appellant was taken to the courtroom; (8) that three or four minutes before the proceeding began, Mr. Rosner told appellant that he should change his not guilty plea to a plea of guilty of second degree murder; (9) that appellant protested that he was not guilty, that the confession was taken because of fear and physical beatings but that Mr. Rosner said that it was not the proper time to bring up the confession and that a guilty plea would save his life and "then I [appellant] could later explain by a writ of habeas corpus how my confession had been beaten out of me"; (10) that Mr. Rosner said that "the District Attorney, Mr. Hogan, was an extremely tough man and that he would be in court later"; (11) that Mr. Rosner told appellant that "the confession would in all probability get me [appellant] the electric chair and that he could attack the confession later without risking his life; that these were the motivating reasons for the change of plea, and that "I [appellant] did not plead guilty because I had committed the crime."

In contrast to this supplemental affidavit signed by Willie Richardson and notarized under a "County of New York" heading on January 15, 1968, by William E. Donahue, the record of the change of plea proceedings on July 22, 1963, before the Hon. George Pastel of the New York Supreme Court, Special and Trial Term, Part 34 (appellant's appendix) shows that appellant was represented by two attorneys, Alfred I. Rosner, Esq., and William P. McCooe, Esq.; that the following colloquy took place between Court and the defendant [appellant here]:

> The Court: Now, did you discuss this case fully with Mr. McCooe and Mr. Rosner?
>
> The Defendant: Yes, sir, I did.

The Court: Did you understand them when you spoke to them about your case?

The Defendant: Yes, sir.

The Court: Were you threatened in any manner, shape, or form, by anyone in order to induce you to take this plea?

The Defendant: No, sir.

The Court: Are you taking this plea of your own free will and volition?

The Defendant: Yes, sir.

The Court: Have any promises been made to you by anyone, that is, your counsel, the District Attorney, the court officers, jail keepers, or anybody, concerning the sentence which this Court, meaning I, will impose in this case?

The Defendant: No, sir.

The Court: You are taking this plea of your own free will and volition?

The Defendant: Yes, sir.

The Court: Have any promises—without any promises of whatever kind or nature so far as sentence is concerned; is that right?

The Defendant: Yes, sir.

In *Townsend* v. *Sain,* 372 U. S. 293, 312-13 (1963), the Supreme Court stated the principle for determining when an evidentiary hearing must be held in a *habeas corpus* case:

". . . Where the facts are in dispute, the federal court in habeas corpus must hold an evidentiary hearing if the habeas applicant did not receive a full and fair evidentiary hearing in a state court, either at the time of the trial or in a collateral proceeding. In other words a federal evidentiary hearing is required unless the state-court trier of fact has after a full hearing reliably found the relevant facts."

This basic principle nolds true unless a petitioner's allegations are "vague, conclusory, or palpably incredible," *Machibroda* v. *United States*, 368 U. S. 487, 495 (1962), or are "patently frivolous or false," *Commonwealth of Pennsylvania ex rel. Herman* v. *Claudy*, 350 U. S. 116, 119 (1956).

Shortly after the decision in *Townsend* v. *Sain*, this court had occasion to consider the requirement of holding an evidentiary hearing in a *habeas corpus* case presenting, as here, an issue of the voluntariness of a guilty plea. In *United States ex rel. McGrath* v. *LaVallee*, 319 F. 2d 308, 311-12 (2d Cir. 1963), this court stated:

> "When the petition in support of an application for *habeas corpus* reveals upon its face that it is defective as a matter of law, the habeas court may dismiss the application without a hearing. . . . Moreover, a hearing is not required when the habeas court has before it a full and uncontested record of state proceedings which furnishes all of the data necessary for a satisfactory determination of factual issues. . . . When, however, petitioner alleges that a guilty plea entered by him was the product of deceit, promise, or threat, and facts are specifically set forth which support that allegation and which create issues incapable of resolution by a simple examination of the files and records before the federal District Court, that court must grant the petitioner a hearing. Certainly, petitioner cannot be denied a hearing merely because the facts asserted by him are contradicted by the answer of the State's prosecuting officers, for it is this denial which creates the factual issue to be resolved." [Citations omitted.]

The court below considered only the transcripts of the minutes of the proceedings when the plea was entered and sentence imposed along with appellant's petition, and con-

cluded that appellant's plea was voluntarily entered and, therefore, no hearing would be necessary.

A conviction which is based upon an involuntary plea of guilty is inconsistent with due process of law and is subject to collateral attack by federal *habeas corpus*. *McGrath*, *supra*, 319 F. 2d at 311; *United States ex rel. Seibold* v. *Reincke*, 362 F. 2d 592, 593 (2d Cir. 1966). And the Supreme Court has stated that "a conviction following trial or on a plea of guilty based on a confession extorted by violence or by mental coercion is invalid under the Federal Due Process Clause." *Pennsylvania ex rel. Herman* v. *Claudy*, 350 U. S. 116, 118 (1965).

In *United States ex rel. Vaughn* v. *LaVallee*, 318 F. 2d 499 (2d Cir. 1963), this court stated that "[a] plea of guilty which is prompted by fear that unconstitutionally obtained evidence will be used at trial will not sustain a conviction." This statement, however, was subsequently rejected in *United States ex rel. Glenn* v. *McMann*, 349 F. 2d 1018 (2d Cir. 1965), *cert. denied*, 383 U. S. 915 (1966). The petitioner in *Glenn* argued that his plea of guilty had been coerced by the existence of an alleged involuntary confession. The district court, however, denied the writ of habeas corpus without an evidentiary hearing after finding that the petitioner had failed to exhaust his state remedies. This court denied the petitioner's request for leave to proced *in forma pauperis* and for assignment of counsel on a different ground, saying:

> "A voluntary guilty plea entered on advice of counsel is a waiver of all non-jurisdictional defects in any prior stage of the proceedings against him. *United States ex rel. Swanson* v. *Reincke*, 344 F. 2d 260 (2d Cir. 1965); *United States ex rel. Boucher* v. *Reincke*, 341 F. 2d 977 (2d Cir. 1965). Any language to the contrary in *United States ex rel. Vaughn* v. *LaVallee*,

318 F. 2d 499 (2d Cir. 1963) is herewith disavowed." 349 F. 2d at 1019.

The issue of voluntariness had not been briefed, but the decision was apparently based upon a finding that the petitioner had not raised a genuine issue of fact in connection with the voluntarines of the plea.

In *United States ex rel. Martin* v. *Fay*, 352 F. 2d 418 (2d Cir. 1965), *cert. denied*, 384 U. S. 957 (1966), this court reaffirmed the holding of *Glenn*. As Judge Waterman (whose concurrence was based on the exhaustion rule) pointed out, the word "voluntary" as used in the majority opinion was ambiguous, the majority opinion seemingly holding that either representation by counsel or a review of the colloquy between the prisoner and the judge was conclusive on the issue of the voluntariness of the guilty plea. Judge Waterman wrote: "I conclude that the majority may have in mind that unless a guilty plea is the product of force directly applied to the speaker at the time he pronounces the word 'Guilty,' no extenuating circumstances of any kind will justify a court in inquiring into events preceding this plea." 352 F. 2d at 419-20.

The weight of authority supports the holding of *Glenn* and *Martin, supra*, to the extent that a *voluntary* guilty plea waives all non-jurisdictional defects. See *United States ex rel. Rogers* v. *Warden*, 381 F. 2d 209, 213 (2d Cir. 1967) and cases cited therein. The explanation for this rule was given in *Kercheval* v. *United States*, 274 U. S. 220, 223 (1927), as being that "a plea of guilty differs in purpose and effect from a mere admission on an extra-judicial confession, it is itself a conviction. Like a verdict of a jury, it is conclusive. More is not required; the court has nothing to do but give judgment and sentence."

However, if a voluntary guilty plea is to be equated with a waiver of important constitutional rights, it is only

logical that the standards for determining voluntariness must be as high as those for wavier. The presence of counsel and the conversation between judge and prisoner at the time the plea is taken are not necessarily conclusive on the question of whether the plea was voluntary. While these factors are relevant in determining whether the plea was voluntary, there may well be situations in which other matters which are outside the record must be considered in making that determination.

In this case, the petitioner alleges that his guilty plea was the result of the threatened use of a coerced confession, that he did not want to plead guilty and wanted to assert his claim that the confession was coerced, but that his attorney inaccurately informed him that this was not the proper time to bring up the matter and that the claim should be presented at a later time. The decisions of a number of other circuits indicate that a petitioner would be entitled to an evidentiary hearing where somewhat similar allegations are made. See *Carpenter* v. *Wainwright*, 372 F. 2d 940 (5th Cir. 1967); *Doran* v. *Wilson*, 369 F. 2d 505, 507 (9th Cir. 1966); *Shelton* v. *United States*, 292 F. 2d 346, 347 (7th Cir. 1961), *cert. denied*, 369 U. S. 877 (1962). In *Smith* v. *Wainwright*, 373 F. 2d 506, 507-8 (5th Cir. 1967), a case almost identical in its facts to the present appeal, it was stated: "Where the guilty plea has been made after one fifteen-minute conference during which an entire capital case, including an allegedly coerced confession, had to be considered, a hearing is clearly called for to ascertain whether the guilty plea was freely made, without infection from the confession and with 'effective assistance of counsel.'"

The existence or threatened use of a coerced confession may not itself render the guilty plea involuntary. A defendant who has a basis for claiming that his confession was coerced may nevertheless elect to forego that claim and

to plead guilty—whether because of "his own knowledge of his guilt and a desire to take his medicine," *Doran* v. *Wilson*, 367 F. 2d 505, 507 (9th Cir. 1966); because "he also knows that other admissible evidence will establish his guilt overwhelmingly," *White* v. *Pepersack*, 352 F. 2d 470, 472 (4th Cir. 1965); because he prefers to plead guilty to a lesser charge rather than run the risk of conviction on a more serious charge; or because for some other reason he determines that it is in his best interest to plead guilty. A defendant who knowingly and deliberately follows this course should not be in a better position, with regard to the subsequent assertion of such claims on collateral attack, than the defendant who fails to object at trial.

Of course the exploration of these considerations virtually compels disclosure of what occurred between defendant and his counsel. Petitioner, having alleged what was told him and what was not, has waived his privilege against disclosure and his counsel is free to disclose whatever took place between him and his client.

The case is remanded for a hearing to develop all the facts with directions that the hearing be transferred to the Southen District of New York and be held with all reasonable expedition before one of the Judges of said District. In the event that the facts as ultimately found warrant further proceedings, consideration should be given thereto by the appropriate authorities.

On the hearing directed hereby to be held, special attention should be given to the statement given under oath by appellant that he did not plead guilty because he had committed the crime and to appellant's answers on July 22, 1963 under the Court's specific questioning:

> The Court: Now, did you commit this crime?
>
> The Defendant: Yes, sir.
>
> The Court: Now, did you on or about March 24, 1963, in the County of New York, wilfully and feloni-

ously strike Rosalie Smith with a knife, thereby causing her death?

The Defendant: Yes, sir.

Serious charges five years after the event are made under oath against a member of the Bar appointed by the Court to represent appellant in defense of a first degree murder indictment, which can be summarized as inadequate representation to say the least. Full opportunity should be given to Mr. Rosner and his co-counsel to present their versions of the facts. Appellant and the Assistant District Attorney were also participants in the events of July 22, 1963; the appellant, the notary and probably others in the events of January 15, 1968.

John T. Baker, Esq., whose able representation of appellant is appreciated by this Court, is assigned to represent appellant, Willie Richardson, on the hearing.

Appendix B

Circuit Court Opinions—Williams.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 48—September Term, 1968.

(Argued September 10, 1968 Decided March 20, 1969.)

Docket No. 30964

UNITED STATES OF AMERICA *ex rel.*
McKINLEY WILLIAMS,

Petitioner-Appellant,

—v.—

HON. HAROLD W. FOLLETTE, Warden of Green Haven State Prison, Stormville, N. Y.,

Respondent-Appellee.

Before:

LUMBARD, *Chief Judge,*
SMITH and ANDERSON, *Circuit Judges.*

Appeal from judgment and order of the United States District Court for the Southern District of New York, Thomas F. Croake, *Judge,* denying without hearing application for writ of habeas corpus.

Reversed and remanded.

GRETCHEN WHITE OBERMAN, New York, N. Y. (Anthony F. Marra, New York, N. Y., on the brief, *for petitioner-appellant.*

Appendix B

MURRAY SYLVESTER, Asst. Attorney General, State of New York (Louis J. Lefkowitz, Attorney General and Samuel A. Hirshowitz, First Asst. Attorney General, on the brief), *for respondent-appellee.*

SMITH, *Circuit Judge:*

This is an appeal by McKinley Williams from an order of the United States District Court for the Southern District of New York, Thomas F. Croake, *J.*, denying, without a hearing, his application for a writ of habeas corpus. Reversed and remanded for a hearing to determine the voluntariness of Williams' guilty plea.

On January 23, 1956, Mabel Cummings was held up with a toy pistol, raped, and robbed. Two days later Williams was arrested, and while in police custody he confessed. On March 16, 1956, he appeared in Bronx County Court and entered a plea of guilty on the advice of his lawyer. On April 19, 1956, Williams was convicted of second degree robbery on his plea of guilty and was sentenced to 7½ to 15 years in prison as a second felony offender. No appeal was taken from the judgment of conviction.

In 1964 petitioner applied for a writ of error *coram nobis* to vacate this conviction. In his petition, Williams stated that he was arrested without a warrant and taken to the Simpson Street police station where he was held on an "open" charge, that he was held for 16 hours before being arraigned, that he was handcuffed to a desk while interrogated by police about a two-day old crime, that he was threatened with a pistol and physically abused, that he was not informed of his right to counsel, and that he gave a confession out of fear and exhaustion. He also al-

leged that he was inadequately represented by assigned counsel; that he did not want to plead guilty; that his attorney (who was later disbarred), knowing of an alibi defense, talked him into pleading guilty and misled him into thinking that he was pleading guilty to a misdemeanor rather than a felony. He allegedly was not told of the consequences of his plea or the nature or meaning of the charge. Faced with the allegedly coerced confession, and the New York procedure, later declared unconstitutional in *Jackson* v. *Denno,* 378 U. S. 368 (1964), whereby the jury would determine the voluntariness of his confession, Williams entered the guilty plea.

His writ was denied without a hearing in the state courts, and thereupon Williams applied for a writ of habeas corpus in the United States District Court for the Southern District of New York. Judge Croake denied Williams' petition without a hearing on the basis of *United States ex rel. Glenn* v. *McMann,* 349 F. 2d 1018, 1019 (2 Cir. 1965), cert. denied 383 U. S. 915 (1966), where we said that "a voluntary plea entered on advice of counsel is a waiver of all non-jurisdictional defects in any prior stage of the proceedings." In addition, Judge Croake said that he had some difficulty accepting "the assertion that the right to go to trial was relinquished because [petitioner] believed he would not receive a fair determination on the issue of voluntariness," since Williams entered his plea of guilty almost eight years prior to the Supreme Court decision in *Jackson* v. *Denno, supra.*

In *United States ex rel. Ross* v. *McMann,* Docket No. 32140, slip op. 3853 (2 Cir. February 26, 1969) (*en banc*), and its companion case, *United States ex rel. Dash* v. *Follette,* Docket No. 30420, slip op. 3867 (2 Cir. February 26, 1969) (*en banc*), we held that while a voluntary guilty plea constitutes a waiver of all non-jurisdictional defects, a conviction based on a guilty plea is open to collateral

attack if the petitioner can show that the plea was not in fact voluntary. Explaining that it was wrong to read *Glenn* as an absolute bar to collateral attack when there is an issue as to the motivation of the plea, we said that there must be a hearing where the constitutional violations alleged are not irrelevant to the issue of voluntariness. A guilty plea, if induced by promises or threats which deprive it of the character of a voluntary act, is denied. *Machibroda* v. *United States,* 368 U. S. 487, 493 (1969). The applicable principle was stated by the Supreme Court in *Townsend* v. *Sain,* 372 U. S. 293, 312-313 (1969):

> Where the facts are in dispute, the federal court in habeas corpus must hold an evidentiary hearing if the habeas applicant did not receive a full and fair subsidiary hearing in a state court, either in the use of the trial or in a collateral proceeding. In other words a federal evidentiary hearing is required unless the state-court trier of fact has after a full hearing reliably found the relevant facts.

In *Ross* and *Dash* we also rejected the argument that Williams who refused to run the pre-*Jackson* gauntlet was said to have deliberately waived the right to test the voluntariness of their confessions. "The petitioner herein was deemed to have waived his coerced confession and was deliberately by-passing state procedure when the witnesss failed to afford a constitutionally acceptable reason presenting that claim, and he cannot be deemed and has entered a voluntary guilty plea if the plea was substantially motivated by a coerced confession the validity of which he was unable, for all practical purposes, to contest." *United States ex rel. Ross* v. *McMann, supra* at slip op. 3866.

For the reasons set forth in *Ross* and *Dash,* we think that the allegations in Williams' petition are sufficient to require a hearing on the voluntariness of his guilty plea. He says that he was threatened with a pistol and that he confessed to a "tale" narrated by a plainclothesman. He says that the confession was the only evidence against him, an allegation which, if true, makes this an even stronger case than *Ross* or *Dash.* He says that he was not even in the state at the time of the alleged crime. None of these allegations are controverted by the record. Unlike *United States ex rel. Rosen* v. *Follette,* Docket No. 32264, slip op. 3907 (2 Cir. February 26, 1969) (*en banc*), therefore, Williams' petition alleges significantly more than the "rather vague claim that the plea was somehow infected by the confession." Slip op. at 3911.

Despite six *corum nobis* applications in New York, Williams has never had a state hearing, and yet plainly the allegations in his petition raise questions which cannot be answered by reference to the transcript alone. If petitioner pleaded guilty on the advice of a lawyer who knew of the existence of a perfectly good alibi defense, then there is certainly some question as to whether Williams was adequately represented by counsel when he entered his guilty plea. "[I]t is not for a lawyer to fabricate defenses, but he does have an affirmative obligation to make suitable inquiry to determine whether valid ones exist." *Jones* v. *Cunningham,* 313 F. 2d 347, 353 (4 Cir.), cert. denied 375 U. S. 832 (1965). See also *Quarles* v. *Balkcom,* 254 F. 2d 985 (5 Cir. 1966), where the Fifth Circuit held that the petitioner, who was incarcerated in a county jail on the date of the alleged crime, was entitled to an evidentiary hearing to show that his guilty plea was a "mistake" and that the plea was induced by inadequate representation of counsel.

Similarly, if petitioner was misled by his lawyer into thinking he was pleading guilty to a misdemeanor, there

is some question as to whether the guilty plea was made "intelligently." Compare *United States ex rel. Boucher* v. *Reincke,* 341 F. 2d 977 (2 Cir. 1965). Indeed, the Supreme Court has said that withdrawal of a guilty plea should be allowed if it has been "unfairly obtained or given through ignorance, fear or inadvertence." *Kercheval* v. *United States,* 274 U. S. 220, 224 (1927). Under these circumstances, the petitioner is entitled to an evidentiary hearing to determine whether "the guilty plea was freely made without infection from the confession and with 'effective assistance of counsel.'" *Smith* v. *Wainwright,* 373 F. 2d 506, 508 (5 Cir. 1967).

This does not mean, of course, that the petitioner will necessarily prevail on the merits, but we think that he has alleged enough to require a hearing. As we said in *Ross* and *Dash,* the conviction would stand if the habeas judge determined either that the confession was voluntary and that petitioner was represented by competent counsel, or if petitioner was unable to show that the plea was substantially motivated by the confession or the alleged incompetence of assigned counsel.

We reverse and remand with instructions to hear and determine petitioner's application unless a hearing is held by the courts of the state determining under the standards set forth herein the issue of the voluntariness of petitioner's plea within 60 days from the date of issuance of the mandate herein, or such further time as the District Court may for good cause allow.

LUMBARD, *Chief Judge* (dissenting):

I dissent.

The majority now require the state court, or perhaps the federal court in addition, to inquire into the voluntariness of a plea of guilty entered by Williams in the Bronx

County Court in March 1956 to robbery in the second degree in settlement of an indictment which charged 5 felonies including rape and robbery. The trial court must now also inquire into the voluntariness of the confession which Williams claims he made and which he also claims was the inducing cause of his plea of guilty.

For the reasons set forth in my dissenting opinion in *United States ex rel. Ross* v. *McMann,* slip opinion filed February 26, 1969, at pages 3879 to 3894, I would not require a trial court to inquire into the voluntariness of a plea of guilty entered in a state court prior to the Supreme Court decision in *Jackson* v. *Denno,* 378 U. S. 368 (1964), where the claim is that the plea was induced by an involuntary confession.

In addition it seems to me that the claims of Williams are insubstantial on their face. It seems highly unlikely on this record that the only evidence against Williams could have been his own confession, as he now claims. The charges in the indictment included holding up one Mabel Cummings with a toy pistol, raping her and robbing her. The record discloses no allegations which make it believable that Mabel Cummings could not and would not have testified that Williams was her assailant. Such testimony would usually be sufficient to convict.

Nor is Williams' claim that he had alibi evidence which would have shown that he was out of the state at the time any more believable, as he gives no particulars whatever with respect to such evidence and to his assertion that he advised his attorney of such an abili and that his attorney failed to do anything about it.

Williams' petition is unbelievable in still another respect—his claim that his lawyer led him into thinking he was pleading to a misdemeanor when he pleaded to robbery in the second degree. This claim is especially incredible in light of the facts that Williams was a second

felony offender and that he failed to raise the claim for 8 years.

Of course the state has not yet had reason to refute these claims Williams makes because at the time Judge Croake passed upon them and dismissed the petition without hearing this court had not yet announced its opinion in *United States ex rel. Ross* v. *McMann* and related cases. I point out the insubstantiality of the claims not only to emphasize that, in my opinion, there was no need to make any answer to Williams' claims, but also because it seems to me that even under the holding of the majority, and what the majority members of this court said in *United States ex rel. Ross* v. *McMann,* it might still be possible for the state to present record evidence of such nature that the petition could be acted upon and dismissed without the calling of any witnesses.

I also refer to these glaring defects in Williams' petition to emphasize the point I made in my dissenting opinion in *Ross* that New York State courts, and subsequently our own federal courts, will be overburdened by the requirement that they spend valuable time in listening to insubstantial claims regarding events so far in the past that memories and records will be so imperfect and incomplete that the court can do little but speculate. Undoubtedly trial judges who must listen to such claims will be able, readily and speedily in the great majority of cases, to determine that the claims are incredible and almost entirely an exercise in imagination prompted by the reading of opinions, such as those in *Ross,* which suggest facts justifying relief.

I would affirm the judgment of the district court which denied the petition without a hearing.